Petition

Supreme Court, U.S.
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81-1318

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. ____

CATHOLIC SOCIAL SERVICES
OF TUCSON, *Petitioner,*
v.
P.C., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

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January 11, 1982

QUESTIONS PRESENTED

1. Whether an Indian child born out of wedlock is "domiciled" on the reservation on which his mother is domiciled within the meaning of 25 U.S.C. §1911(a) when (a) he has never resided on the reservation, (b) his mother relinquished him for adoption, requesting that the matter proceed in state court, and (c) the mother subsequently revoked her consent.

2. Whether a state court has jurisdiction under U.S.C. §1911(b) to hear a subsequent involuntary termination of parental rights action despite the Indian mother's request for transfer to tribal court where (a) she had previously relinquished the child for adoption, (b) she objected to the adoption action being heard in tribal court, (c) she did not revoke her consent until after the child was placed in an adoptive home in another state and adoption proceedings had begun in state court, and (d) the child remained in the adoptive placement pending the termination action.

3. Whether the limitation under 25 U.S.C. §1912(f), restricting the involuntary termination of parental rights to cases where continued custody of the child by the Indian parent is likely to result in serious emotional or physical damage to the child, precludes termination based on abandonment where (a) the parent had previously relinquished the child for adoption, (b) the parent has never seen, contacted, or had custody of the child, and (c) expert testimony established the likelihood of serious emotional or physical damage should the child be removed from his adoptive placement.

4. Whether the absolute right under U.S.C. §1913(c) to revoke consent to adopt for any reason at any time prior to the entry of a final decree of adoption, without allowing for inquiry into the best interests of the child, violates the Indian child's Fifth Amendment rights to due process and equal protection of the law.

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PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

The petitioner, Catholic Social Services of Tucson, respectfully prays that a writ of certiorari issue to review the order and opinion of the Arizona Court of Appeals, Division Two, entered in this proceeding on September 14, 1981.

OPINION BELOW

The opinion of the Court of Appeals, reported as *In the Matter of the Appeal in Pima County Juvenile Action No. S-903*, _____ Ariz. _____, 635 P.2d 187 (App. 1981), appears in the Appendix hereto. The Arizona Supreme Court denied review without rendering an opinion.

JURISDICTION

The opinion of the Arizona Court of Appeals, Division Two, was entered on September 14, 1981. A timely petition for review was denied by the Arizona Supreme Court on October 14, 1981, and this petition for *certiorari* was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257 (3). 28 U.S.C. §2403(a) may be applicable.

QUESTIONS PRESENTED

1. Whether an Indian child born out of wedlock is "domiciled" on the reservation on which his mother is domiciled within the meaning of 25 U.S.C. §1911(a) when (a) he has never resided on the reservation, (b) his mother relinquished him for adoption, requesting that the matter proceed in state court, and (c) the mother subsequently revoked her consent.

2. Whether a state court has jurisdiction under U.S.C. §1911(b) to hear a subsequent involuntary termination of parental rights action despite the Indian mother's request for transfer to tribal court where (a) she had previously relinquished the child for adoption, (b) she objected to the adoption action being heard in tribal court, (c) she did not revoke her consent until after the child was placed in an adoptive home in another state and adoption proceedings had begun in state court, and (d) the child remained in the adoptive placement pending the termination action.

3. Whether the limitation under 25 U.S.C. §1912(f), restricting the involuntary termination of parental rights to cases where continued custody of the child by the Indian parent is likely to result in serious emotional or physical damage to the child, precludes termination based on abandonment where (a) the parent had previously relinquished the child for adoption, (b) the parent has never seen, contacted, or had custody of the child, and (c) expert testimony established the likelihood of serious emotional or physical damage should the child be removed from his adoptive placement.

4. Whether the absolute right under U.S.C. §1913(c) to revoke consent to adopt for any reason at any time prior to the entry of a final decree of adoption, without allowing for inquiry into the best interests of the child, violates the Indian child's Fifth Amendment rights to due process and equal protection of the law.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 25:

§1911 Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any child custody proceedings involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

§1912(f) Parental rights termination orders; evidence; determination of damage to the child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§1913(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Consitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Respondent herein is an Indian domiciled on the Ft. Belknap Indian Reservation in Montana. She became

pregnant out of wedlock at age 15 and left the reservation to stay with an aunt and uncle in Nevada. She received counseling from the Nevada Catholic Welfare Bureau, to whom she subsequently relinquished the child for adoptive placement. Although she was given the opportunity to raise the child with her aunt's help and was presented with other options concerning the child, she remained adamant about her decision to relinquish him. The child was born on February 27, 1980. There is no indication that the mother ever saw the child, and she did not ever inquire about him as other relinquishing mothers, including Indians, do. On March 18, 1981, she executed her relinquishment in open court. The relinquishment reads as follows:

VOLUNTARY RELINQUISHMENT OF AN INDIAN CHILD FOR ADOPTION

STATE OF NEVADA) ss.
COUNTY OF CLARK)

PATRICIA SUE CRANTZ, being first duly sworn, deposes and says:

That affiant is the parent of BABY BOY CRANTZ, a minor child born out of wedlock on the 27th day of February, 1980 in the St. Rose de Lima Hospital, Henderson, County of Clark, State of Nevada.

That Affiant states that she is a member of the Assinboine Gros Ventre Indian Tribe and is enrolled at the Fort Belknap Indian Reservation, Fort Belknap, Montana.

That Affiant states her present address is Box 163, Moapa, Nevada.

That Affiant does request, for reasons of confidentiality that all legal matters pertaining to this adoption remain in the jurisdiction of the State Court and not be transferred to Tribal Court.

That Affiant further requests, for reasons of confidentiality, that her minor child be placed in an Indian Home of a Tribe other than her own.

That Affiant does freely and without reservation relinquish the said minor child to Nevada Catholic Welfare

Bureau, Inc., 808 South Main Street, Las Vegas, Nevada 89101, for the purpose of adoption of said minor child.

Affiant authorizes said Bureau to give its consent to the adoption of said minor child, by said person or persons so selected, all in the manner as required by law.

That Affiant has been advised and understands that this relinquishment may be withdrawn at anytime prior to the entry of a final decree of adoption. This may be done by executing, under oath, a document stating her intention to revoke this relinquishment in the same court that the relinquishment was signed.

That Affiant hereby relinquishes all parental rights as a natural parent, to the custody and control of said minor child and waives notice of hearing of any petition that may hereafter be filed to adopt said minor child, and waives all notice of process in the premises, respecting the adoption of said child.

s/ *PATRICIA SUE CRANTZ*

ATTEST:
s/ [*witness*]
s/ [*witness*]

****

CERTIFICATION OF JUDGE

On this 18 day of March, 1980, PATRICIA SUE CRANTZ, personally appeared before me and in my presence executed the foregoing document entitled VOLUNTARY RELINQUISHMENT OF AN INDIAN CHILD FOR ADOPTION. The foregoing document was executed freely and voluntarily by PATRICIA SUE CRANTZ after acknowledging to me that she understood and agreed to the provisions set forth therein.

s/ *J. CHARLES THOMPSON*
DISTRICT JUDGE

In reliance upon the foregoing instrument the Nevada Catholic Welfare Bureau contacted Catholic Social Services of Tucson, and the child was placed through the latter agency with a Papago Indian couple on May 24, 1980. The Papago couple filed an adoption petition in the Pima County, Arizona Superior Court and were granted temporary custody *pendente lite*. Pursuant to Arizona Revised Statutes § 8-113(C) the adoptive parents were required to wait for six months before entry of a final adoption decree in the state court.

On September 29, 1981 the mother executed and filed a revocation of her relinquishment in accordance with the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901 *et. seq.*, and requested return of the child. The Papago adoptive parents declined to return the child and, instead, requested that Catholic Social Services of Tucson file the petition for involuntary termination of the mother's parental rights, concerning which the instant petition is brought. The mother and her tribe were duly notified of the pendency of the termination of parental rights action and the May 8, 1981 trial date. The birth father's parental rights had been terminated involuntarily by a previous order of the Eighth District Court of Nevada, entered May 29, 1980.

Patricia Sue Crantz filed a petition to transfer the matter to tribal court on March 11, 1981, and the Fort Belknap Indian Community filed a motion to intervene and to transfer proceedings to tribal court on May 11, 1981. The latter motion was denied as being moot. The former petition raised the federal questions ultimately decided in the decision below. Petitioner herein replied to those federal questions, raising the arguments asserted herein, and raised the constitutional challenge to the Act in the Opposition to Petition to Transfer to Tribal Court filed on April 7, 1981. See pp. 20–23 of Appendix hereto. The trial court took the mother's petition under advisement and, after trial, denied it. The tribe did not participate in the trial and the mother appeared only through counsel, not presenting any witnesses or testimony by affidavit or deposition. The trial court granted the petition for involuntary termination of

parental rights on May 8, 1981 and entered its formal findings of fact, conclusions of law, and order on May 19, 1981. The court found: that the child was domiciled in Pima County, Arizona; that good cause existed not to transfer the matter to tribal court; that the mother had abandoned the child; that the removal of the child from his preadoptive home and return to his mother would result in serious emotional or physical damage to the child; and that the petitioner had met its burden beyond a reasonable doubt. See pp. 14–15 of Appendix herein.

The order of the Pima County, Arizona, Superior Court was reversed by the Arizona Court of Appeals, Division Two on three grounds: that the child was actually domiciled on the Fort Belknap Indian reservation, and therefore, the state court had no jurisdiction; that if the state court had concurrent jurisdiction, it should have declined to exercise it because the only relevant issue was the mother's fitness, and the pertinent evidence on that issue was on the reservation; and that in any event, the petitioner failed to meet its burden of proof by failing to produce evidence of the mother's unfitness or of attempts to preserve the parent-child relationship. See pp. 6–11 of Appendix herein. The Court of Appeals rejected petitioner's constitutional argument that the child was denied due process and equal protection under the Indian Child Welfare Act of 1978 by stating that the denial of access to state court is based solely upon the political status of the parent and child and the quasi-sovereign nature of the tribe, which discriminatory classification is not prohibited by the United States Constitution. See p. 11 Appendix herein.

REASONS FOR GRANTING THE WRIT

1. THE ARIZONA COURT OF APPEALS HAS DECIDED IMPORTANT FEDERAL QUESTIONS OF SUBSTANCE CONCERNING 25 U.S.C. §§1911, 1912, and 1913 WHICH HAVE NOT BEEN DETERMINED BY THIS COURT.

The Indian Child Welfare Act of 1978, 25 U.S.C. §§1901 *et seq.*, has not been construed widely by the state

courts and has never been construed by this Court. The Act has drastically altered the area of adoptions of Indian children, but many questions have been raised about the practical effect of the Act. In *Fisher v. District Court*, 424 U.S. 386 (1976), this Court addressed the issue of a tribal court's exclusive jurisdiction over adoption proceedings arising on the Indian reservation. However, this Court has not applied *Fisher* to the Indian Child Welfare Act, which includes a provision for the parent to object to tribal court jurisdiction, 25 U.S.C. §1911(b). In the case at bar the Indian mother initially objected to tribal court jurisdiction, requesting that all legal matters proceed in state court. Only after the child had been placed in a pre-adoptive placement under state court jurisdiction did the mother revoke her relinquishment and request transfer of the involuntary termination of parental rights action to tribal court. Therefore, the termination action may be considered a legal matter properly in state court under §1911(b). Further, the child herein has never been on the reservation, and the pertinent actions of relinquishment and abandonment took place off the reservation. Therefore, it is not clear that this case is within the *Fisher* holding.

The Act does not define its concept of "domicile," which is crucial to the threshhold determination of the tribe's exclusive jurisdiction. The trial court in this matter found that the child was domiciled in Arizona because of the mother's relinquishment and abandonment and his total lack of contact with the reservation; however, the Arizona Court of Appeals held that the child's domicile remained that of his mother because a new one had not been acquired. See p. 7 of Appendix hereto. Such a ruling results in the non-discretionary jurisdiction of a forum which has no actual contact with the child or information concerning his current situation and only the presence of the mother to provide partial information concerning the relinquishment and her subsequent relationship to the child.

Further, the Act does not set forth guidelines for a determination of "good cause" for a state court to decline transfer of the case to tribal court pursuant to 25 U.S.C.

§1911(b). Nonbinding guidelines are found in 44 Fed. Reg. 2400, 24001, RG (1) (1979). The legislative history of the Act indicates that the state court should apply a "modified doctrine of forum non conveniens, in appropriate cases to insure that the rights of the child as an Indian, the Indian parents or custodian, are fully protected." H.R. Rep. No. 1386, 95th Cong. 2d Sess. 21, reprinted in [1978] U.S. Code Cong. & Ad. News 7530, 7544. The decision below mentioned those guidelines and the discussions found in two law review articles. One of the principal factors cited as important was the accessibility of proof. See p. 8 of Appendix hereto. In most cases the Indian parent will produce witnesses residing on the reservation to rebut evidence of parental unfitness, and the Court of Appeals stresses that the issue in an involuntary termination action is the unfitness of the parent rather than the fitness of the adoptive parents. See p. 9 of Appendix hereto. However, the decision below misconstrues the Act's grounds for termination by construing 25 U.S.C. §1912(f) as "the only ground for termination of parental rights." See p. 10 of Appendix hereto. Such a construction precludes the use of the local law's substantive grounds for termination, which in most states, including Montana and Arizona, includes the ground of abandonment. Uniquely among other grounds, abandonment focuses on the relationship of the parent to the child rather than on the intrinsic unfitness of the parent. In the present case the pertinent evidence existed in Nevada and Arizona. Because the mother's unfitness *per se* was not at issue, evidence available on the Montana reservation concerning her fitness would not be relevant.

There is nothing in the language of the Act to support the conclusion that 25 U.S.C. §1912(f) is itself a substantive ground for involuntary termination of parental rights or that it is the sole ground. The section merely states that no such termination may be ordered in the absence of a specific finding supported by expert testimony and established beyond a reasonable doubt. The Act merely provides additional procedural requirements and evidentiary standards which must be met. To petitioner's knowledge no

other published opinion construes this section in the manner of the decision below. It is of great importance to all litigants under the Act to know whether in fact they may rely on the substantive grounds for termination provided for by local law in prosecuting their cases. If the section does provide substantive grounds, then the Court of Appeals read into the section a requirement of finding parental unfitness which is not contained in the language therein. The trial court made an explicit finding that removal of the child from his adoptive parents and return to his mother would meet the standard of likelihood of harm to the child, established by expert testimony and proven beyond a reasonable doubt. See pp. 14–15 of Appendix herein.

The decision below finds that 25 U.S.C. § 1912(d) requires that a petitioner prove rehabilitative services to prevent the breakup of an Indian family. See pp. 10–11 of Appendix hereto. The record below is clear that the Nevada Catholic Welfare Bureau counseled the mother about keeping the child and raising him with the help of the aunt and uncle. Nonetheless, she remained adamant about relinquishing him. The court's construction of the Act would require that efforts at reunion be made after an abandonment occurs despite the child's needs or interests. While this is consistent with the court's finding of an absolute right to revoke relinquishment for adoption and the absence of state grounds for involuntary termination of parental rights, it totally ignores the interests of the child.

The decision below construed 25 U.S.C.§1913(c) as providing an absolute right to revoke consent for adoption, stating that it was apparent that "Congress was not concerned with the reason a parent might have for withdrawal of consent." See p. 10 of Appendix hereto. This construction leaves no room at all for inquiry into the child's interests. The child and his adoptive family remain at risk for an indeterminate time depending on local waiting periods for adoption and the congestion of court calendars. If the decision below correctly construed 25 U.S.C. § 1913(c), then that section is unconstitutional as applied to the Indian child as depriving him of due process and equal protection of the law.

The jurisdictional issues have been the subject of much litigation, leaving public and private agencies as well as trial courts to guess at the proper construction and application of the Act. In the mean time, Indian children are held in limbo. The associate director of the American Indian Lawyer Training Program, Inc., Joseph Meyers, has written: "The Act makes promises to Indian children but does not establish substantive rights for them."THEY ARE YOUNG ONCE BUT INDIAN FOREVER 16 (J. Myers, ed. 1980). It is crucial that courts and the parties involved in termination of parental rights and adoption cases under the Act know whether the best interests of the child may be considered and whether the Act provides a single ground for termination or merely mandates additional requirements before ordering termination.

The decision below rejected petitioner's equal protection argument based on *Fisher v. District Court*, 424 U.S. 382(1976), stating that Indian children's denial of access to state court was based on the political status of the parent and child and the quasi-sovereign nature of the tribe. See p. 11 of Appendix hereto. However the Court of Appeals misstated petitioner's argument. Petitioner's equal protection claim is not merely that Indian children are denied access to state court, but rather, that Indian children's best interests are not a factor to be considered in the substantive decisions made under the Act.

While the equal protection clause of the Fourteenth Amendment to the United States Constitution does not apply to the Federal government, it is clear that racially discriminatory Federal actions which would violate that clause if done by a state violate the Fifth Amendment's due process clause. See *Bolling v. Sharp*, 347 U.S. 497(1954). Congress may extend remedial benefits or services to Indians without violating the Fifth Amendment. See *Maynor v. Morton*, 510 F.2d 1254, 1956(D.C.Cir. 1975). The Act holds itself out as such a remedial attempt. 25 U.S.C. § 1902. The Indian parent uniquely is given the right to revoke her relinquishment for any reason at any time prior to the entry of a final adoption decree. 25 U.S.C.

§ 1913(c). However, this remedial benefit works to the serious disadvantage of the Indian child, whose attachments and needs are not even considered. The Act applies not only to Indian children who are tribal members, but also to those who are eligible for tribal membership and whose biological parent is a tribal member. 25 U.S.C. § 1903(4). If such discrimination against Indian children is not racially based, it is nonetheless based on an improper political classification, eligibility for tribal membership. The Act leaves to the Indian tribes the definition of eligibility for membership, and many tribes require only a small percentage of Indian blood to qualify. Therefore, a child whose parent is a tribal member but who is himself only a small part Indian, who is not a member of any tribe, and who has never had contact with the reservation, is brought within the Act because he is tribe eligible. This broad application of the Act goes well beyond the *Fisher* holding.

In addition, the standard of proof that is required by the Act, beyond a reasonable doubt, traditionally has been rejected in custody cases because of the balancing among competing interests. The preponderance of the evidence standard is generally applied. This Court has under consideration this term a case in which the issue is whether clear and convincing evidence is constitutionally required. *Santosky v. Kramer*, Supreme Court No. 80-5889, on a writ of *certiorari* from 427 N.Y.S.2d 319 (App.Div. 1980). To require proof beyond a reasonable doubt fails to give sufficient weight to the interests of the child. Because the Act governs termination of parental rights by tribal as well as state courts, the lack of statutory provision for considering the best interests of the child before allowing revocation of relinquishment and the statutory standard for burden of proof remain due process and equal protection issues regardless of the forum. The importance and widespread application of these issues justify the grant of *certiorari* to review the judgment below.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE ADOPTION OF INDIAN CHILDREN WHICH HAMPER EFFECTIVE AND STABLE PLACEMENTS OF SUCH CHILDREN.

One of the primary evils which Congress sought to prevent by enacting the Indian Child Welfare Act of 1978 was the situation wherein "an alarmingly high percentage of Indian families are broken up by the removal ... of their children" by nontribal agencies who frequently place them in non-Indian placements. 25 U.S.C. § 1901(4). Often the states have "failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). Because of these historical factors the Act leans very heavily towards tribal decision making and the Indian parent's rights. This statutory scheme, however, as construed in the decision below, seriously hampers the security of Indian children who are not removed from the tribe by culturally-biased social workers, but rather, who are voluntarily placed by their parent for adoption through state and private agencies.

Each state and tribal waiting period for the finalization of adoption is different, ranging from no waiting period at all to more than one year. 25 U.S.C. § 1913(c) provides that a parent who voluntarily relinquishes an Indian child for adoption may revoke her consent "for any reason at any time prior to the entry of a final decree...." The time limit involved is based solely on the local law of the forum. The parent whose voluntary act caused the child to be placed for adoption, thereby removes him from the stability of her own home and causes him to begin forming a stable attachment in his new home. The law of virtually all states recognizes the importance of pre-adoptive stability by disallowing revocation of relinquishments after adoptive placement except for legal cause shown. See, *e.g.*, Montana Code Annotated §40-8-112; Nevada Revised Statutes §127.080(1); *In re Adoption of Holman*, 80 Ariz. 201, 295

P.2d 373(1956). The construction placed on 25 U.S.C. § 1913(c) in the decision below has the effect of giving no consideration whatsoever to the child's interest in stability. The Court of Appeals found that the Act "is based on the fundamental assumption that it is in the Indian child's best interest that the relationship to the tribe be protected." See p. 2 of Appendix hereto. But the trial court's findings were clear that the best interests of this child were in his adoptive placement. See p. 14 of Appendix hereto. While Indian children may well be vital tribal resources, 25 U.S.C. § 1901(3), surely the Act cannot be construed so as to render them the chattel of their tribes and parents such that their actual best interests are not factor in the decision-making process. The decision below states that under the Act "adoption agencies and prospective adoptive parents must be held to assume the risk that a parent... might change her mind before the adoption is finalized." See p. 10 of Appendix hereto. It is unfair, however, that the Indian child be forced to assume this risk.

Adoption agencies have sought to comply with the Act's placement preferences by recruiting Indian adoptive parents. The scarcity of such placements resulted in the child's placement by the Nevada Catholic Welfare Bureau with an Indian couple in Arizona. Had the mother not objected to tribal court jurisdiction initially, the child would have been placed by the tribe in Montana, and the relevant evidence would be accessible in tribal court. However, the initial choice to proceed through state court altered the child's position considerably, rendering the tribal court an inconvenient forum. To permit a mother to unilaterally change the forum in which the child's custody would be determined, without allowing an inquiry into the child's circumstances is to place the Indian child at a serious disadvantage.

These issues have major significance for all Indian relinquishments and justify the grant of *certiorari* to review the judgment below.

3. STATES, PRIVATE AGENCIES, AND PARTIES INVOLVED IN ADOPTIONS OF INDIAN CHILDREN NEED THIS COURT'S EARLY GUIDANCE IN THE CONSTRUCTION OF 25 U.S.C. §§1911, 1912, and 1913.

The record below indicates that agencies are finding it difficult to recruit Indian parents who are willing to accept an Indian child for adoption because of the risk that the birth parent will revoke her relinquishment prior to finalization of the adoption decree and the child will be removed from their home. Many agencies are refusing to accept relinquishments from Indian mothers because they cannot guarantee stability and continuity of care. The entire area of Indian adoptions is chaotic at this time. The decision below, if allowed to stand, will serve only to exacerbate the situation. The very goal of providing Indian homes for Indian children will be frustrated if the uncertainties concerning Indian adoptions continue.

The State of Oklahoma has challenged the constitutionality of the Indian Child Welfare Act on at least two occasions, *In the Matter of Melinda Jean Twobabies*, No. Jf-79-1121 (W. Dist. Ct., Okl. 1980), and *Kickapoo Tribe of Oklahoma v. Rader*, No. 81-947-T (currently pending in the W. Dist. Ct. Okl.). Other constitutional challenges to the Act are at various stages of trial and appeal. There is clearly a widespread concern about the problems created by the Act, especially the lack of provision for consideration of the best interests of the child.

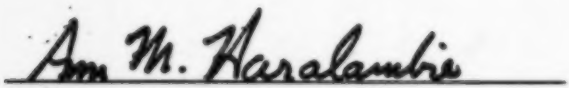
This Court can provide much needed guidance and stability in the area of Indian adoptions by construing the Act, (1) to allow a child who has never lived on the reservation to be considered a state domiciliary when his parent has relinquished him for adoption and placed him in an out-of-state pre-adoptive home; (2) to allow state court jurisdiction to continue where the parent originally chose the state forum and did not revoke her relinquishment and request tribal jurisdiction until after a state court adoptive placement had been made, and where the tribal court is an inconvenient forum; (3) to allow involuntary termination of parental

rights based on abandonment as proven by state standards where return to the parent would be likely to result in serious emotional or physical damage to the child because of the child's relationship with his preadoptive parents; and (4) to allow consideration of the best interests of the child before permitting the parent's revocation of relinquishment after the child's preadoptive placement. Settlement of these issues in a timely manner in order to clarify the rights and duties of the various parties, and particularly to determine what interests of the child may be considered, justifies the grant of *certiorari* to review the judgment below.

CONCLUSION

For these reasons, a writ of *certiorari* should issue to review the judgment and opinion of the Arizona Court of Appeals, Division Two.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN THE MATTER OF THE APPEAL IN)
PIMA COUNTY JUVENILE ACTION)
NO. S-903)
)

2 CA-CIV 4083
OPINION

APPEAL FROM THE SUPERIOR COURT
OF PIMA COUNTY
Cause No. S-903
Honorable Thomas Meehan, Judge

REVERSED WITH DIRECTIONS

HOWARD, Judge.

Appellant, natural mother of an Indian child, brings this appeal from a juvenile court order severing her parental rights. This case is governed by the federal Indian Child Welfare Act of 1978 and is one of first impression in this state. We agree with appellant that reversal is required.

Congressional investigation of child custody proceedings involving Indian children culminated in passage of the Act. In the Act, Congress declared a two-fold national policy: the protection of the best interests of Indian children, and the promotion of stable and secure Indian tribal entities. 25 U.S.C.A. §1902. To prevent the separation of Indian children from family and tribal heritage, the Act established minimum federal standards applicable to child custody proceedings.

Hearings conducted in 1974 before the Senate Committee on Indian Affairs revealed a pattern of discrimination against American Indians in child welfare and child custody. Testimony indicated that for decades officials had

removed a disproportionately large number of Indian children from their homes and reservations, and had placed them in non-Indian homes and that many of the removals were unwarranted because officials showed too little deference to Indian cultural norms and denied due process in child custody proceedings. These practices deprived many children of their tribal and cultural heritage.

To reverse this erosion of Indian family life, Congress enacted the Act. See H. R. Rep. No. 1586, 95th Cong., 2d Sess. 8, reprinted in [1978] U.S. Code Cong. & Ad. News 7530.

The concept that Indian tribes are independent communities possessing their own natural rights permeates the Act. In its allocation of jurisdiction in custody proceedings the Act defers to the inherent sovereignty of the tribe over matters affecting this internal welfare. 25 U.S.C.A. §1911(a). More significantly, it provides mechanisms whereby the tribe can exert its jurisdiction or influence beyond reservation boundaries in child custody actions involving off-reservation tribal members. 25 U.S.C.A. §1911(b). This latter section modifies the general rule that Indians off the reservation are subject to state jurisdiction by requiring state courts to transfer to the tribe most child custody proceedings upon petition by the Indian child's parent, Indian custodian, or tribe. Only if a parent objects, or the tribal court declines, or there is "good cause" not to transfer the proceeding, may this referral jurisdiction be prevented. In addition, 25 U.S.C.A. §1911(c) allows representation of tribal interests, even when the state court retains jurisdiction, by affording the parent, Indian custodian or child's tribe the right to intervene in the state court proceeding.

The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.[1] By its enactment, Congress legisla-

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[1]Indian Child Welfare Act of 1978: Provisions and Policy, 25 S.D.L.Rev. 98 et seq. (1980) per author's telephone interviews in 1979 with Bertram Hirsch, Association on American Indian Affairs, who helped draft the Act.

tively created a new jurisdictional framework in Indian child welfare, replacing the outmoded geographical concepts of presence or domicile with a jurisdictional standard based on the ethnic origin of the child. This standard avoids the problems of forum shopping and gives real authority to tribal courts to adjudicate child custody issues. The Act reflects Congressional recognition of the importance of child rearing to the tribe.

The Act defines certain procedures to be followed in state court proceedings involving Indian children. These procedures protect the Indian parent or custodian from a moving party's abuse of either voluntary or involuntary placement procedures. Even if the state court retains jurisdiction, the tribe is protected against the possibility of state court bias against tribal culture as it may intervene at any point in the custody proceeding 25 U.S.C.A. §1911(c), and the parent-child relationship can be terminated only by a showing of parental unfitness beyond a reasonable doubt. 25 U.S.C.A. §1912(f). Additionally, the party seeking to effect termination of parental rights is required to satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 U.S.C.A. §1912(d). The effectiveness of the changed jurisdictional structure is insured by inclusion in the Act of a full faith and credit provision. 25 U.S.C.A. §1911(d). We shall discuss these and other provisions of the Act in addressing the merits of this case.

The facts disclosed by the record are as follows. Appellant is a member of the Assiniboine Tribe in Montana and was fifteen years old when her child was born on February 27, 1980, in Henderson, Nevada. On March 18, 1980, she executed a voluntary relinquishment of her parental rights which was subsequently accepted by the Nevada District Court. The document recited that the minor child was relinquished to the Nevada Catholic Welfare Bureau, Inc. for the purpose of adoption and the bureau was authorized to consent to the child's adoption. One paragraph of the document recited:

"That Affiant has been advised and understands that this relinquishment may be withdrawn anytime prior to the entry of a final decree of adoption. This may be done by executing, under oath, a document stating her intention to revoke this relinquishment in the same court that the relinquishment was signed."

On September 29, 1980, appellant requested the return of her child and the appropriate document was filed on October 2 in the Nevada court. By letter dated October 8, 1980, the Nevada Catholic Welfare Bureau was advised by the Nevada court clerk of the revocation of relinquishment and that arrangements should be made promptly for the return of the child to appellant. In the interim, however, the Nevada agency had made arrangements with appellee, Catholic Social Service of Tucson, to place the child with an adoptive family and in fact the baby was picked up in Nevada on May 24 and taken to Tucson. The Nevada Agency was unable to return the child to appellant as the Arizona agency informed Nevada "that the parents were unwilling to give up the child, and they wanted to take it to Court."

On October 27, 1980, a petition for termination of parental rights was filed in Arizona alleging that the natural mother had abandoned the child. The same day a temporary custody order was entered directing that temporary custody of the child remain with his prospective adoptive parents under the supervision of the petitioner, Catholic Social Service of Tucson. Appellant was served on October 31 in Montana and the tribal council was served on November 3. A letter from the attorney for the Nevada Catholic Welfare Bureau, with an enclosed certified copy of appellant's revocation of voluntary relinquishment, was filed on November 18, 1980.

By letter dated November 7, 1980, appellant and her mother requested the tribal chairman in Montana to intervene in this Arizona custody proceeding. The record reflects that on January 20, 1981, a letter was written to the

presiding judge of Pima County Superior Court by the vice-chairman of the Assiniboine and Gros Ventre tribes of the Fort Belknap Indian Community Tribal Government of the Fort Belknap Indian Reservation, Montana. The writer advised the court that the tribal government wished to intervene in this custody matter and have jurisdiction transferred to the tribal court in Montana. The letter concluded by stating: "Please advise me if there are any additional documents which needs to be filed prior to the date of hearing on this matter."

On March 11, 1981, appellant filed a petition to transfer this case to the tribal court in Montana. The petition alleged that the tribal court had exclusive jurisdiction under the Indian Child Welfare Act, that appellant did not object to transfer, and that the tribal court was willing to accept jurisdiction. Appellee's opposition, filed April 7, asserted that "good cause" existed for retention of state court jurisdiction in that (1) Montana, the proposed tribal forum, would have no evidence concerning the best interests of the child as he had never lived in Montana and (2) separation from his adoptive parents would cause a substantial risk of serious emotional harm to him.

By April 10 minute entry, a hearing on the severance petition and the petition to transfer was ordered to be held on May 8, 1981. On May 6, appellant filed a reply to the opposition to her petition for transfer. Appended were copies of various documents supporting her position that state court jurisdiction was improper.

At the commencement of the May 8 hearing, the court took under advisement the petition to transfer and proceeded to hear evidence on the severance petition. At the conclusion of the hearing, the petition to transfer was denied and severance of appellant's parental rights was ordered. The court made the following findings of fact: That appellant and her tribe had been notified of the hearing, that the minor child was domiciled in Arizona inasmuch as his mother had relinquished her parental rights on March 18, 1980, and the child has resided continuously in Arizona since May 24, 1980; that the mother had had no contact with

the child for more than six months and had abandoned the child, that the mother had filed a revocation of her relinquishment in Nevada on October 2, 1980, and that the tribe had filed notice of intervention but had not otherwise participated in this matter; that the child was eligible for membership into the Assiniboine tribe; and that the best interests of the child were that he remain with his prospective adoptive parents. The court concluded that it had jurisdiction because Catholic Social Service and the child resided in and were domiciled in Pima County, that good cause existed not to transfer the matter to tribal court for hearing, that the mother had abandoned the child within the meaning of A.R.S. §8-533(1), that removal of the child from his preadoptive home and his return to the mother would result in serious emotional or physical damage to him, and that the petitioner for severance had met its burden of proof beyond a reasonable doubt.

A formal motion to intervene by the Fort Belknap Indian community and to transfer the proceedings to tribal court was filed on May 11, 1981, indicating that inasmuch as appellant had withdrawn her consent to adoption, it was appropriate that, pursuant to the spirit and letter of the Indian Child Welfare Act, the proceedings be transferred to the tribal court in Montana for investigation and determination of placement of the child.

We agree with appellant that the severance order must be vacated and custody of the child returned to her for three reasons. First, the Arizona court lacked jurisdiction of this proceeding; second, assuming arguendo the state court had concurrent jurisdiction, it should have declined to exercise it; and third, assuming arguendo retention of jurisdiction was appropriate, the requisite burden of proving grounds for termination of parental rights was not met. We shall discuss each of these reasons.

EXCLUSIVE JURISDICTION

25 U.S.C.A. §1911(a) provides in pertinent part:

> "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."

It is not disputed that this was a child custody proceeding and that appellant's child is an Indian child within the purview of the Act. Appellant, an unemancipated minor, was domiciled within the Fort Belknap reservation in Montana as that was the domicile of her father. Garay Uppen v. Superior Court of Pima County, 116 Ariz. 81, 567 P.2d 1210 (App. 1977). Her illegitimate child, however, took the domicile of its mother. In Re Estate of Moore, 68 Wash.2d 792, 415 P.2d 653 (1966); in re Guardianship of Sharp, 41 Cal.App.2d 79, 106 P.2d 244 (1940); 25 Am.Jr.2d Domicil §69. The domicile of an infant born out of wedlock remains that of its mother until a new one is lawfully acquired. Application of Morse, 7 Utah 2d 312, 324 P.2d 773 (1958); in re Guardianship of Sharp, supra. Although the child was living in Arizona with the prospective adoptive parents pursuant to a temporary custody order, its domicile had not yet been legally changed and therefore it was a domiciliary of the reservation in Montana. The only change in the status of appellant's child was his removal to this state by reason of appellant's relinquishment of him for the purpose of adoption.

CONCURRENT JURISDICTION

25 U.S.C.A. §1911(b) provides:

> "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe,

> the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian of the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe." (Emphasis in original)

This provision was intended to permit a state court to apply a modified doctrine of forum non conveniens. H. R. Rep. No. 1386, supra, at 21. The juvenile court found good cause for exercise of jurisdiction in this state. The term "good cause to the contrary" is not defined in the statute but a definition is found in 44 Fed.Reg. 24000, 24001, RG(i) (1979) as including but not limited to the facts that (1) the child's biological parents are unavailable; (2) no Indian custodian has been appointed; (3) the child has had little contact with the tribe for a significant period of time; (4) the child has not resided on the reservation for a significant period of time; and (5) the child, over 12 years of age, has indicated opposition to the transfer. One law review article suggests that "good cause to the contrary" could include the absence of a tribal mechanism for handling child custody proceedings. See The Indian Child Welfare Act—Tribal Self-Determination Through Participation in Child Custody Proceedings, Wis.L.Rev. 1979: 1202, 1213, f.n.69. Another law review article points out that accessibility to proof would seem to be the principal factor on which state courts could rely to retain jurisdiction. Indian Child Welfare: A Jurisdictional Approach, 21 Ariz.L.Rev. 1123, 1143 (1979). The author points out: (1) If the tribe desires that the case be heard by the tribal court, distance from the reservation in and of itself would not be sufficient "good cause" for the state court to refuse to transfer the proceedings despite the expense, and (2) in most instances an Indian parent will call witnesses residing on the reservation to rebut evidence as to parental unfitness and the state court must make a determination as to which party is most able to bear the ex-

pense of producing witnesses in distant courts. The only justification for retention of jurisdiction in Arizona is the presence of the child and the prospective adoptive parents. However, the issue in these termination proceedings is not the fitness of the adoptive parents but rather the unfitness of the parent whose relationship is sought to be severed.

The very posture of this case from start to finish militates against retention of jurisdiction here. 25 U.S.C.A. §1913(c) provides:

> "In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child *shall be returned* to the parent." (Emphasis added)

As noted above, appellant withdrew her relinquishment on October 2, 1980. Her revocation was timely and properly filed in the Nevada court. This information was conveyed to the prospective adoptive parents. An adoption worker who testified at the severance hearing expressed her concurrence with the adoptive parents in trying to keep the child:

> "I feel that the child's security in the home would be in jeopardy if the child were moved.
>
> I felt also frankly that the law is unfair, it does not specifically acknowledge the best interests of the child. And I had serious reservations as to what was now prompting this young woman to change her decision.
>
> And the fact that there was no followup as to see what her needs were at the moment, and whether her need was for the child, or she had another need that she was calling out for help on."

On cross-examination, she indicated her awareness that Congress felt that the Act was in the best interest of the sovereignty of the tribes but, in her opinion, the Act does not address the child's needs.

It is apparent from the very wording of 25 U.S.C.A. §1913(c) that Congress was not concerned with the reason a parent might have for withdrawal of consent. The Act unquestionably provides a higher standard of protection to the rights of parents in termination proceedings. E. A. v. State, 623 P.2d 1210 (Alas. 1981). When an Indian child within the purview of the Act is involved, adoption agencies and prospective adoptive parents must be held to assume the risk that a parent such as appellant might change her mind before the adoption is finalized.

We believe the lower court should have deferred to tribal jurisdiction. Evidence concerning the mother's fitness as a parent would be more readily accessible in Montana. Qualified expert witnesses as to whether custody in the mother would likely result in serious emotional or physical damage to the child would also be more accessible as expert witnesses lacking knowledge of the tribal culture and values may not be "qualified" to give an opinion.

BURDEN OF PROOF

Finally, even assuming that the Arizona court had jurisdiction and properly declined to refer the proceeding to tribal court, the only ground for termination of parental rights was not proven.

25 U.S.C.A. §19112(f) provides:

> "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

Section 1912(d) provides:

> "Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy

> the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

Since appellant had revoked her voluntary relinquishment, these provisions controlled.

There is no evidence as to appellant's fitness as a parent or any attempt to preserve the parent-child relationship. In fact, the contrary appears. Appellant was entitled to the return of her child, then only seven months old, when she revoked her relinquishment. Any potential emotional trauma to the child if the contemplated adoption is aborted was engendered by the conduct of the adoptive parents not adhering to the mandates of the Act. The evil which Congress sought to remedy by the Act was exacerbated by the conduct here under the guise of "the best interests of the child."

Appellee's argument that Indian children are being denied equal protection of the law because of denial of access to state court has no validity. The denial of access to state court is based solely upon the political status of the parent and child and the quasi-sovereign nature of the tribe. This is a discriminatory classification which is not prohibited by the United States Constitution. Fisher v. District Court, 424 U.S. 382 (1976); Matter of Guardianship of D. L. L. & C. L. L., 291 N.W.2d 278 (S.D. 1980).

The order severing appellant's parental rights is set aside. The cause is remanded with directions to enter an appropriate order granting the petition to transfer and directing appellee to forthwith return appellant's child to her.

s/Lawrence Howard
LAWRENCE HOWARD, Judge.

CONCURRING:

s/James D. Hathaway
JAMES D. HATHAWAY, Chief Judge.

s/Ben C. Birdsall
BEN C. BIRDSALL, Judge.

SUPREME COURT

STATE OF ARIZONA
201-WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

IN THE MATTER OF THE APPEAL IN)
PIMA COUNTY JUVENILE ACTION)
NO. S-903)
)

October 15, 1981

Supreme Court
No. 15667-PR

Court of Appeals
No. 2 CA-CIV 4083

Pima County
No. S-903

The following action was taken by the Supreme Court of the State of Arizona on October 14, 1981 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 15th day of October, 1981.

S. ALAN COOK, Clerk
By *s/Michael R. Pryor*
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE
OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

In the Matter of:	)
JOSEPH ANDREW CRANTZ,	)
A Minor.	)
	)

No. S-903

FINDINGS OF FACT,
CONCLUSION OF LAW,
and ORDER

This matter having come before the Court on May 8, 1981, the mother having been duly served and appearing through JOYCE EDLINE HOLSEY, her attorney, the matter being heard and submitted to the Court,

THE COURT FINDS that the mother, PATRICIA SUE CRANTZ, and her tribe, the Assiniboine Gros Ventre tribe, have been notified that this matter was set for hearing on this date; that the minor child is domiciled in the State of Arizona inasmuch as his mother had relinquished her parental rights on March 18, 1980 and the child has resided continuously in Arizona since May 24, 1980; that the mother has had no contact with the child whatsoever for more than six months; that the mother has abandoned the child; that the mother filed a revocation of her relinquishment in the Eight District Court of Nevada on October 2, 1980; that the tribe has filed notice of intervention herein but has not otherwise participated in this matter; that the best interests of the child are that he remain with his prospective adoptive parents; and that the minor child is eligible for membership into the Assiniboine Tribe, and

THE COURT CONCLUDES that this Court has jurisdiction over the matter because Petitioner and the child reside in and are domiciled in Pima County, Arizona; that good cause exists why this matter should not be transferred to the Assiniboine-Gros Ventre tribal court for hear-

ing; that the mother has abandoned the child within the meaning of A.R.S. §8-533(1); that the removal of the child from his preadoptive home and return to the mother would result in serious emotional or physical damage to the child; and that Petitioner has met its burden beyond a reasonable doubt.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the parental rights existing between PATRICIA SUE CRANTZ and JOSEPH ANDREW CRANTZ be and hereby are terminated.

DONE IN OPEN COURT this 18 day of May, 1981.

s/Thomas Meehan
THOMAS MEEHAN
JUDGE OF THE SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE
OF ARIZONA
IN AND FOR THE COUNTY OF PIMA
JUVENILE COURT

In the Matter of:	)
JOSEPH ANDREW CRANTZ,	)
A Minor	)
	)

No. S-903

OPPOSITION TO PETITION
TO TRANSFER TO
TRIBAL COURT

Petitioner herein, CATHOLIC SOCIAL SERVICE, by and through its attorney undersigned, opposes the natural mother's Petition to Transfer to Tribal Court for the following reasons:

I

Since the minor herein is an Indian child, the provisions of the Indian Child Welfare Act of 1978, 25 U.S.C.A. §1901 et seq., apply to the matter at bar. The minor has never resided on his tribe's reservation in Montana.

II

The tribe's right to exclusive jurisdiction and to transfer proceedings, as set forth in 25 U.S.C.A. §1911, are not absolute, and the state court may retain jurisdiction upon showing of good cause.

III

The minor child herein was born on February 27, 1980, in Henderson, Nevada. The natural mother relinquished her parental rights in open court in Nevada on March 18, 1981. Revocation of that relinquishment was not executed until September 29, 1980, more than six months after relinquishment.

IV

The child has resided in Arizona in an Indian preadoptive home since May 24, 1980, and the parents and sister in that home have been the only family he has ever known.

V

The child is at a developmental stage in which separation from his adoptive parents would constitute a substantial risk of serious emotional harm that could be permanent [see report from Dr. Ronald S. Fischler, attached hereto as Exhibit A and incorporated herein].

VI

The child has never lived in Montana, the proposed tribal forum, and there exists absolutely no evidence in Montana concerning the best interests of the child.

VII

The best interests of the child require that this Court retain jurisdiction over this matter.

Dated: April 6, 1981.

s/Ann M. Haralambie
ANN M. HARALAMBIE
Attorney for Petitioner

Copy of the foregoing
delivered this day:

JAY W. McEWEN
Southern Arizona Legal Aid, Inc.
155 East Alameda
Tucson, Arizona 85701

Attorney for Natural Mother

MEMORANDUM OF POINTS AND AUTHORITIES

I

GOOD CAUSE EXISTS FOR THIS COURT TO RETAIN JURISDICTION

25 U.S.C.A. §1911 (6) provides a limitation on extra-territorial jurisdiction when the state court determines that there is good cause to retain jurisdiction. That provision states, in relevant part:

> In any State court proceeding for the... termination of parental rights to an Indian child not domiciled

or residing within the reservation of the Indian child's tribe, the court, *in the absence of good cause to the contrary*, shall transfer such proceeding to the jurisdiction of the tribe....[emphasis added.]

The Supreme Court of Montana has analyzed the situation of jurisdiction under the Indian Child Welfare Act as follows:

> A possible change in the relationship between parent and child is so important that the change should be made only *by the jurisdiction which has significant ties and interests in the child* and which will be best able to determine what the best interests of the child are with regard to custody, H. Goodrich E. Scoles Conflicts of Laws, 271 (4th ed. 1964). Writers in this field generally agree that *any choice of law rules with regard to jurisdiction must give way to the child's welfare as the determinative touchstone* for jurisdiction even though it is also the basis for deciding custody disputes on the merits. R. Leflar, American Conflicts of Law 492 (3rd ed. 1977); Restatement (Second) of Conflict of Laws §79, Comment a (1971); See Sampsell v. Superior Ct. (1948), 32 Cal. 2d 763, 197 P.2d 739, 748-750. Indeed, courts do not unanimously ascribe to any choice of law rule precisely for the reason that each court tends to apply its own view of the *universal rule that the prime jurisdictional consideration is the best interests of the child.* H. Goodrich & E. Scoles, Conflict of Laws 272 (4th ed. 1964). (Emphasis added.) *In the Matter of the Application of Bertelson*, No. 148885 (filed September 17, 1980).

If the state court finds good cause and retains jurisdiction, the tribe's rights are protected by the provision allowing that the tribe may intervene at any point in the proceeding. 25 U.S.C.A. §1911(c).

The Petition for Termination of Parental Rights filed herein is based on cause. Under the Act, the Petitioner has a very heavy burden. 25 U.S.C.A. §1912(f) provides:

> No termination of parental rights may be ordered in such [involuntary] proceeding in the absence of a

> determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

That statutory provision requires expert evidence relating to potential damage to the child. That evidence is available only in Arizona, where the child has lived for virtually all his life.

There are three possible fori for this proceeding; Montana, the state of the mother's domicile and her tribe's reservation; Nevada, the state where the mother received counseling concerning her pregnancy and relinquishment and where the child was born and relinquished, and Arizona, the state where the child has resided since early infancy with his adoptive family.

The only evidence available in Montana concerns the mother's background before mid-pregnancy and after the child's birth, her current situation, and tribal values. That evidence could be made available in Arizona by the presence of the mother and a tribal representative.

The evidence available in Nevada concerns the mother's pre- and post-natal counseling and state of mind relative to her decisions to relinquish the child and to keep the pregnancy confidential from the tribe. The Petitioner herein intends to make that evidence available in Arizona by having a witness from the Nevada Catholic Welfare Bureau testify in person at the severance hearing.

There is abundant evidence in Arizona concerning the minor child, his needs, his attachment to his adoptive family, and the impact on him of separation from that family. All of the experts, including social workers and physicians, who have pertinent evidence concerning the child are in Arizona. It would be an insurmountable burden for the Petitioner to make that evidence available for tribal court in Montana.

If this court transfers jurisdiction, the temporary custody orders under the adoption and severance actions would terminate and the de facto legal custody of the child

would be posited in the mother or the tribe. The damage to the child that the Petitioner seeks to show would be accomplished prior to any hearing taking place in Montana because the child would be removed from his adoptive family upon termination of the temporary custody orders.

II
INSOFAR AS THE INDIAN CHILD WELFARE ACT PRECLUDES AN ASSESSMENT OF THE CHILD'S BEST INTERESTS, IT VIOLATES EQUAL PROTECTION

If the minor child herein were not an Indian, the mother would find it very difficult to revoke her consent for his adoption. Arizona law provides that even a minor parent may execute a valid consent. A.R.S. §8-106 (c). Nevada, the state where the consent was executed, has a similar provision. N.R.S. §127-080 (z). In Nevada, a valid relinquishment is irrevocable. N.R.S. §127. 080(1). Under Arizona law a relinquishment cannot be revoked after the child's placement in a preadoptive home absent legal cause shown and a showing that return to the birth parents would be in the child's best interest. *In re Adoption of Holman*, 80 Ariz. 201, 295 P.2d 373(1956). Similarly, had the mother relinquished in her own state of Montana, withdrawal of consent would not be permitted absent a showing that such a revocation would further the best interests of the child. M.C.A. §40-8-112.

The state statutes clearly provide that once a valid relinquishment is executed, the child's best interests are of overriding concern, especially if the child has already been placed in an adoptive home. The mother herein chose to leave her reservation upon becoming pregnant. She went to Nevada, where an aunt of hers lived, and where she received extensive counseling from the Nevada Catholic Welfare Bureau. It was only after carefully exploring all of the options to adoption that she executed her relinquishment. Based on that relinquishment the child's position was

materially changed to his detriment—he was placed with another family as their son.

The Petitioner does not contend that the parties were unaware of the mother's right under the Act to revoke her consent prior to entry of the adoption decree, however unlikely exercise of such a right may have appeared at the time. Allowing such a result as a matter of law, however, would place the child, as an Indian, at a disadvantage not suffered by non-Indian children. His security and stability would be shattered, perhaps at the cost of permanent difficulties in establishing trust relationships. I. this is the result compelled by the Act, then such provision violates the child's right to equal protection by failing to allow his best interests to be considered merely because of his race.

While the equal protection clause of the Fourteenth Amendment to the United States Constitution does not apply to the federal government, it is clear that racially discriminatory federal actions which would violate that clause if done by a state violate the Fifth Amendment's due process clause. See *Bolling v. Sharp*, 374 U.S. 497(1954). When tribal Indians "are put at a serious racially based disadvantage" by a federal statute, their "rights to due process and equal protection under the Fifth Amendment require that they not be treated worse than similarly situated non-Indians." *United States v. Antelope*, 523 F.2d 400, 403–406 (9th Cir. 1975), reversed on other grounds, 97 S.Ct. 1395(1977). Any federal statute which is directed at Indians as a racially defined class is subject to strict scrutiny to prevent invidious discrimination. *Id.*

Congress may extend remedial benefits or services to Indians as a racial group without violating the Fifth Amendment, See, e.g., *Maynor v. Morton*, 510 F.2d 1254, 1256 (D.C. Cir. 1975). The Indian Child Welfare Act holds itself out as such a remedial attempt. 25 U.S.C.A. §1902. The Act attempts to benefit Indian families by providing that removal of a child from his Indian family will be ordered only after an opportunity for an evalution which takes into account the tribe's cultural values. This was required because of the often inappropriate removals of chil-

dren by dominant-culture social workers and courts. What was acceptable parenting within the context of the tribal culture was held to be, in effect, negligence or abuse per se. Protection against such cultural bias was the remedial benefit sought to be conferred upon Indian families, and it is in this context that the case at bar must be analyzed.

The child herein was not removed from his tribe or his mother. Rather, his mother chose to leave the reservation and to relinquish her parental rights to enable him to be adopted. An Indian family was selected, and the adoption process was initiated. The entire sequence was free of any cultural considerations, other than the decision to enhance the child's Indian culture by placement with an Indian family, albeit one from a different tribe. The evil sought to be remedied by the Act does not pertain to this case.

The child, on the other hand, is adversely affected by the Act, if it is construed to require this Court's transfer of the matter to the tribal court or acceptance of the mother's revocation of consent merely because the Act so permits. In this instance the child is denied the stability which the state adoption laws of all three states involved attempt to provide solely on the basis that his mother is an Indian. Herein the rules enunciated in *United States v. Antelope* and *Maynor v. Morton, supra,* conflict. A law conferring a remedial benefit on the Indian mother places the Indian child at a serious disadvantage. The whole scheme of state severance and dependency laws, while recognizing certain parental rights, rules in favor of the child's best interest where there is a conflict between parents and children.

The Petitioner does not contend that the entire Act is unconstitutional. What it does contend is that it is a denial of an Indian child's right to equal protection for his mother to be able to revoke her consent for adoption after he has been placed in an adoptive home merely on the basis that she has changed her mind. This is particularly true when the mother has voluntarily left the reservation and relinquished to an adoption agency after extensive counseling. Not only does such a provision disrupt the adoptive home, but it totally disregards the affect on the child's relation-

ships and security. It does this in a situation where the tribal culture is irrelevant, since there was no state removal of the child based on perceived inadequacies of the Indian mother or her tribal home.

25 U.S.C.A. §1913 (c), as applied to the case at bar, denies the child's right to equal protection under the law in violation of the Fifth Amendment to the Constitution. In furtherance of the policies adopted by the states of Arizona, Nevada, and Montana, and in view of the inapplicability of the major policy considerations of the Indian Child Welfare Act, this Court should decline the mother's request to transfer this matter to the tribal court.

Certificate of service

I hereby certify that on this 11th day of January, 1982, three copies of the Petition for Writ of Certiorari were delivered by messenger service to Joyce Edline Holsey, Esq., Alameda Street, Tucson, Arizona, Counsel for Respondent, and three copies were mailed first class postage prepaid to Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

Ann M. Haralambie

ANN M. HARALAMBIE
2450 E. Speedway Blvd., Suite 1
Tucson, Arizona 85719
Counsel for Petitioner

Opposition

RECEIVED
FEB 11 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

81-1318

IN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. ~~81-1318~~

CATHOLIC SOCIAL SERVICES OF TUCSON, Petitioner,

v.

P.C., Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS, DIVISION TWO

RESPONDENT'S BRIEF IN OPPOSITION

JOYCE EDLINE HOLSEY
Southern Arizona Legal Aid, Inc.
155 East Alameda Street
Tucson, Arizona 85701

Counsel for Respondent

FEBRUARY 9, 1982

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QUESTIONS PRESENTED

1. Whether an Indian child born out of wedlock is "domiciled" on the reservation on which his mother is domiciled within the meaning of 25 U.S.C. §1911(a) when (a) he has never resided on the reservation, (b) his mother relinquished him for adoption, requesting that the matter proceed in state court, and (c) the mother subsequently revoked her consent.

2. Whether a state court has jurisdiction under U.S.C. §1911(b) to hear a subsequent involuntary termination of parental rights action despite the Indian mother's request for transfer to tribal court where (a) she had previously relinquished the child for adoption, (b) she objected to the adoption action being heard in tribal court, (c) she did not revoke her consent until after the child was placed in an adoptive home in another state and adoption proceedings had begun in state court, and (d) the child remained in the adoptive placement pending the termination action.

3. Whether the limitation under 25 U.S.C. §1912(f), restricting the involuntary termination of parental rights to cases where continued custody of the child by the Indian parent is likely to result in serious emotional or physical damage to the child, precludes termination based on abandonment where (a) the parent had previously relinquished the child for adoption, (b) the parent has never seen, contacted, or had custody of the child, and (c) expert testimoney established the likelihood of serious emotional or physical damage should the child be removed from his adoptive placement.

4. Whether the absolute right under the U.S.C. §1913(c) to revoke consent to adopt for any reason at any time prior to the entry of a final decree of adoption,

without allowing for inquiry into the best interests of the child, violates the Indian child's Fifth Amendment rights to due process and equal protection of the law.

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IN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-1813

CATHOLIC SOCIAL SERVICES OF TUCSON, Petitioner,

v.

P.C., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Patricia Sue Crantz respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Arizona Court of Appeals' decision in this case. That opinion is reported as In the Matter of the Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187 (AZ. Ct. App. 1981).

RESPONDENT'S STATEMENT OF FACTS AND OF THE CASE

Respondent Patricia Sue Crantz, a domicilary of the Fort Belknap Indian Reservation, Montana, was fifteen years old when she gave birth to a son on February 27, 1980, at the Nevada Catholic Bureau's Home for Unwed Mothers. On March 18, 1980 she executed a Voluntary Relinquishment Agreement in the Nevada District Court; she was neither represented by counsel nor was a guardian ad litem appointed. See Petitioner's Appendix pages 5-6. (Hereinafter called Pet. App.) On September 17, 1980, she telephoned Nevada Catholic Welfare Bureau, orally revoked her relinquishment and requested the return of her son. On

September 29, 1981, she executed a revocation of her consent; the revocation was filed in the Nevada District Court on October 2, 1980. See Respondent's Appendix page 1. (Hereinafter called Res. App.) By letter dated October 8, 1980, the Nevada Court clerk advised Nevada Catholic Welfare Bureau of the mother's revocation of relinquishment and that arrangements should be made to promptly return the child to respondent. See Res. App. p. 2.

During the interim, however, arrangements had been made with petitioner to place the child with pre-adoptive parents who picked up the child in Nevada on May 29, 1980. When the pre-adoptive parents refused to return the child to respondent, petitioner filed a petition for Involuntary Termination of Parental Rights of Respondent on October 27, 1980 and obtained an Ex-Parte Order on the same day giving the pre-adoptive parents temporary custody under the supervision of petitioner.

On January 20, 1981, a letter was written to the presiding judge of Pima County Superior Court by the vice-chairman advising the court that the Fort Belknap Indian Community wished to intervene in this matter and have it transferred to tribal court. See Res. App. p. 3.
On March 11, 1981, respondent filed a petition to have the matter transferred to the Fort Belknap Tribal Court. On May 8, 1981, the trial court denied respondent's motion to transfer the matter and terminated respondent's parental rights, by minute entry order. See Res. App. 4, 5 and 6.
On May 11, 1981, the Fort Belknap Indian Community's motion to intervene was filed with the Clerk of Pima County Superior Court prior to the entry of a formal order. See Res. App. pp. 7-17.

On May 26, 1981, respondent filed a Notice of Appeal from the Minute Entry Order. On September 14,

1981, the Arizona Court of Appeals, Division Two, vacated the trial court's severance order and ordered the return of the child to respondent for three reasons: First, the Arizona trial court lacked jurisdiction of this proceeding; second, assuming arguendo the state court had concurrent jurisdiction it should have declined to exercise it; and third, assuming arguendo retention of jurisdiction was appropriate, the requisite burden of proving grounds for termination of parental rights was not met. The Petition for Review was denied by the Arizona Supreme Court on October 14, 1981. Petitioner served respondent with a copy of the petition for Writ of Certiorari on January 11, 1982.

Respondent submits her brief in opposition to the review of this matter by this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

I

QUESTION NUMBER ONE DOES NOT PRESENT A FEDERAL QUESTION; PETITIONER DOES NOT PRESENT ANY SPECIAL AND IMPORTANT REASONS TO GRANT REVIEW OF THIS QUESTION

Question number one asks whether, under the fact situation of this case, the child is domiciled on the Indian Reservation within the meaning of 25 U.S.C. §1911(a) where there is no definition of domicile in the Act. Petitioner also alleges that the Court of Appeals' definition of domicile results in the non-discretionary jurisdiction of a forum which has had no actual contact with the child.

Petitioner has failed to state a federal question for this Court to address. Petitioner does not assert that the Arizona Court of Appeals' definition of domicile in accordance with Arizona case law and common law violates any constitutional rights of the child. Furthermore,

neither does petitioner claim that the absence of a definition of domicile in the Indian Child Welfare Act of 1978 (hereinafter called the Act,), violates a constitutional right of the child.

Petitioner has failed to state an important federal question decided by the highest state court that should be settled by this Court. There may well have been federal questions that the petitioner could have raised on the issue of domicile, but it did not raise them and this Court can not review question number one.

II

THE DUE PROCESS CHALLENGE TO 25 U.S.C. §1913(c) WAS NEITHER RAISED NOR DECIDED IN STATE COURT

Although the petitioner did not raise its due process challenge in state court, it did raise the violation of the child's equal protection rights under the Fifth Amendment in is Opposition to the Transfer to Tribal Court as follows:

> "The Petitioner does not contend that the entire Act is unconstitutional. What it does contend is that it is a denial of an Indian Child's right to equal protection for his mother to be able to revoke her consent for adoption after he has been placed in a pre-adoptive home merely on that basis that she has changed her mind...." See Pet. App. pp. 22-23.

The trial judge did not address this issue in its decision in favor of the petitioner. Respondent appealed the trial court's order; petitioner did not cross-appeal on the issue of the constitutionality of the Act.

Rather, the petitioner only addressed the equal protection violation in its Response to Respondent's Notice of Appeal. Petitioner stated that:

> "Petitioner does not contend that the parties were unaware of the mother's right under the Act to revoke her con-

> sent prior to entry of the adoption decree .... Allowing such a result as a matter of law, however, would place the child, as an Indian, at a disadvantage not suffered by non-Indian children.... [S]uch provisions violated the child's right to equal protection by failing to allow his best interests to be considered."
> See Res. App. p. 19.

The Arizona Court of Appeals addressed petitioner's equal protection challenge that "denial of access to state courts violated the child's equal protection rights." The Court of Appeals found no validity to petitioner's argument; it applied Fisher and found that the discriminatory classification was properly based on the quasi-sovereign nature of the tribe.

Although petitioner did raise its equal protection challenge, at no state court proceeding did it raise the due process violation based upon the Indian mother's absolute right to revoke consent to adoption without prior inquiry into the best interests of the child. Petitioner raises this issue for the first time at page 11 in its Petition for Writ of Certiorari by stating that the mother's absolute right to revoke consent for adoption leaves no room at all for inquiry into the child's interests and therefore deprives him of due process and equal protection. Since the due process challenge was neither raised in state court nor addressed by state court, this court does not have jurisdiction to determine it. It has long been established that the Court is vested with no jurisdiction unless a federal questions was raised and decided in the state court below. It is jurisdictional, not discretionary, that this Court may review only those issues which were presented to the state court. Amalgamated Food Employees Union v. Local Logan Valley Plaza, 319 U.S. 308 (Harlan, J., dissenting).

Although it is respondent's position that the

best interests due process violation was not properly raised, respondent will address this issue, nevertheless.

The Court stated in United States v. Antelope, 97 S.Ct. 1395, 430 U.S. 641 (1977), that a disparity between state and federal law is no basis for an equal protection challenge. Under the federal system the national government does not violate equal protection when its own law is evenhanded.

Congress has plenary power to regulate commerce with Indian tribes. Art. I, §8 U.S. Const. Congress has stated that it is this nation's policy to promote the best interests of Indian children and to promote the stability and security of Indian tribes and families. 25 U.S.C. §1902. The parent's absolute right of revocation encourages Indian parents to change their minds and deters non-tribal entities from participation in Indian child custody matters. This statute is therefore in the best interests of the child as it discourages the breakup of Indian families.

In accordance with the spirit of the Act the tribal court is the proper forum to determine the best interests of Joseph Andrew Crantz. The Fort Belknap Tribal Court will consider the best interests of the child when it hears the termination proceedings which have been transferred to its tribal court. See Res. App. p. 27.

Because petitioner did not properly raise the best interests due process challenge, this Court does not have jurisdiction to decide this federal question.

III

THE ARIZONA COURT OF APPEALS INTERPRETED 25 U.S.C. §§1911(a) and 1913(c) IN ACCORDANCE WITH PRIOR DECISIONS OF THIS COURT

This Court of Appeals decided this case upon its interpretation of the meaning of 25 U.S.C. §§1911(a) and

1913(c), in the light of the legislative history of the Act, Congress' statement of policy and its application of Fisher v. District Court, 96 S.Ct. 943, 424 U.S. 382 (1976). It recognized that the Act defers to the inherent sovereignty of the tribe over matters affecting internal welfare. See Pet. App. p. 1. In accordance with 25 U.S.C. §1911(a), the Arizona Court of Appeals granted respondent's Motion to Transfer the proceedings to the Fort Belknap Tribal Court for the reason that the tribal court had exclusive jurisdiction over custody proceedings involving a child domiciled on its reservation.

In Fisher, this Court stated that under a federal statute, the tribal court had exclusive jurisdiction over adoption proceedings of children domiciled on its reservation based not upon race, but on the quasi-sovereign status of the tribe. This Court further stated:

> "Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by self-furthering the congressional policy of Indian government. Morton v. Mancari, 417 U.S. 535, 551-555, 94 S.Ct. 2474, 2483-2485, 41 L.Ed2d 290 (1974)." Id. at 948.

The Arizona Court of Appeals properly interpreted 25 U.S.C. §§1911(a) and 1913(c). Petitioner asks this Court to grant review because the Arizona Court of Appeals addressed previously unanswered questions of statutory interpretation. This is not a reason to grant review as this Court is a court of last resort not a court of general jurisdiction.

IV

THE ARIZONA COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH ANY OPINIONS OF THE STATE COURTS OF LAST RESORT

Although no federal decisions on the Act have been reported, several state supreme courts have interpreted and applied the Act. The supreme courts of the states of South Dakota, Alaska and Oregon have interepreted and applied the Act in a similar manner. See E.A. v. State of Alaska, 623 P.2d 1210 (Alaska 1981); Matter of Guardianship of D.L.L. & C.-L.L., 291 N.W.2d 278 (S.D. 1980); Matter of Charloe, 629 P.2d 1319 (Or. Ct. App.) 1981). The South Dakota Supreme Court dismissed a petition for guardianship based upon abandonment by the parents for the reason that under the Act, the tribal court was the proper forum to determine the custody of an Indian child domiciled on a reservation. Matter of Guardianship of D.L.L. & C.L.L. (supra).

The state supreme courts have also given early guidance to lower courts. Although the Arizona Court of Appeals could have decided this matter solely by applying 25 U.S.C. §§1911(a) and 1913(c), it chose to discuss and interpret other sections of the Act, arguendo, in order to provide early guidance for the lower courts: 25 U.S.C. §§1911(b), 1913(c) and 1912(f). See Pet. App. pp. 1-11. Similarly, a recent Montana Supreme Court decision reversed a judgment terminating the parental rights of an Indian mother not domiciled on an Indian reservation. The court remanded the case for a hearing de novo with instructions that the trial court first consider the jurisdictional issue and if transfer is denied, then proceed in accordance with this opinion and applicable sections of the Indian Child Welfare Act of 1978. Matter of M.E.M., 635 P.2d 1313, at 1318 (1981).

There not only is no conflict in state courts as to the meaning of 25 U.S.C. §§1911(a) and 1913(c), the state supreme courts have given early guidance to lower courts and parties involved in adoptive placement of Indian children. This Court's guidance is not needed.

V

THERE IS A NON CONSITUTIONAL ISSUE WHICH MIGHT ALONE HAVE SERVED AS AN ADEQUATE GROUND FOR DISPOSITION OF THE CASE

This matter can be decided solely on the terms of the relinquishment agreement; this Court does not have to address the questions raised by petitioner. Respondent revoked her voluntary relinquishment agreement in accordance with paragraph VIII; petitioner refused to perform in accordance with the contract even though respondent had an absolute right to revoke and to the immediate return of her child.

Since this matter can be decided under the terms of the contract, review should be denied.

VI

QUESTIONS NUMBER TWO AND THREE RAISE QUESTIONS THAT THE COURT OF APPEALS DISCUSSED AS DICTA AND ARE THEREFORE NOT SUBJECT TO REVIEW BY THIS COURT

It is jurisdictional that this Court may only review final judgments of the courts of last resort. The Arizona Court of Appeals discussed questions two and three, arguendo. Although it found that the trial court had exclusive jurisdiction because the child was domiciled on the reservation, it went on to dicuss, as dicta, the questions of good cause and the grounds for termination under 25 U.S.C. §§1911(b) and 1912(f), respectively. See Pet. App. p. 6. Since the questions were not a necessary part of the final judgment, they are not reviewable by this court.

CONCLUSION

Petitioner has not presented to this Court any special or substantial reasons to grant review on writ of certiorari; respondent requests that this Court deny review.

Respectfully submitted this 9th day of February, 1982.

JOYCE EDLINE HOLSEY
SOUTHERN ARIZONA LEGAL AID, INC.
155 E. Alameda St.
Tucson, Arizona 85701
(602) 623-9461
Attorney for Respondent

CERTIFICATE OF SERVICE

I, Joyce Edline Holsey, hereby certify that on this 9th day of February, 1982, one copy of the Brief in Opposition to the Petition for Writ of Certiorari was mailed to Ann M. Haralambie, Esq., 2450 E. Speedway Blvd., Tucson, Arizona, Counsel for Petitioner, and one copy mailed first class postage prepaid to Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C., 20530. I further certify that all parties required to be served have been served.

JOYCE EDLINE HOLSEY
Southern Arizona Legal Aid, Inc.
155 East Alameda Street
Tucson, Arizona 85701
Counsel for Respondent

EXHIBIT "D"

FILED 5-90
May 6 1987
JAMES N. COBBETT, Clerk
PMel Deputy

D20206

September 29, 1980

FILED
Oct 2 3 53 PM '80
LORETTA BOWMAN
CLERK
BY Laura Anderson

Sister Marilyn Ingram
Director of Adoptive Services
Nevada Catholic Welfare Bureau, Inc.
Box 1926
Las Vegas, Nevada 89101

Dear Sister Ingram:

I, Patricia Sue Crantz, do hereby make the following statement:

> I would like to request that all proceedings of adoptive placement for my child Joseph Andrew be withdrawn and that my child be returned to me as soon as possible.

Please advise me on what other arrangements must be made before Joseph Andrew can be released to me.

Patricia Sue Crantz
Patricia Sue Crantz
natural mother

Subscribed and sworn to, Before me, this 29th day of September, 1980.

(NOTARIAL SEAL)

Conrad D. Diers
Notary Public for State of Montana.
Residing at Harlem, MT 59526
My Commission expires 6-8-81

EXHIBIT "D"

FILED
May 6 19 81
JAMES R. CORBETT, Clerk
By [illegible] Deputy

S-903

October 8, 1980

Sister Marilyn Ingram
Director of Adoption Services
Nevada Catholic Welfare Bureau, Inc.
P. O. Box 1926
Las Vegas, Nevada 89101

Re: JOSEPH ANDREW CRANTZ, a minor
Case No. D 20206

Dear Sister Marilyn:

As you know, Patricia Sue Crantz, on March 18, 1980, executed before the Honorable J. Charles Thompson, Judge of the Eighth Judicial District Court in and for the County of Clark, State of Nevada, a Voluntary Relinquishment of an Indian Child for Adoption. There was subsequently filed, on October 2, 1980, with the Eighth Judicial District Court Clerk, the Court with which the voluntary relinquishment was executed, an original document executed under oath by Patricia Sue Crantz of her intent to withdraw her voluntary relinquishment and specifically requesting the return of the child to her.

In accordance with the Indian Child Welfare Act of 1978, the Clerk of Court is to notify you of the filing of the revocation. On behalf of the Clerk of Court we are hereby notifying your agency of the October 2 filing so that the adopting parents and the agency which is handling the adoption matters can be informed of the revocation of the voluntary relinquishment. Arrangements should be made promptly for the return of the child to Patricia Sue Crantz.

Very truly yours,

John L. Thorndal

JLT/ad
cc: Clerk of Court
Eighth Judicial District
Clark County, Nevada
Case No. D 20206

EXHIBIT "F"

Fort Belknap Community Council

JAN 22 1981

(406) 353-2205
P.O. Box 249
Fort Belknap Agency
Harlem, Montana 59526

Fort Belknap Indian Community
(Tribal Govt.)
Fort Belknap Indian Community
(Elected to administer the affairs of the community and to represent the Assiniboine and the Gros Ventre Tribes of the Fort Belknap Indian Reservation)

FILED
May 6 1981
JAMES N. CORBETT, Clerk
Deputy

January 20, 1981
DATE

S-903

Judge William E. Druke
c/o Office of Clerk
Superior Court of the
State of Arizona
Pima County
Tucson, Arizona 85719

re: In the Matter of Joseph Andrew Crantz, a minor child
No. #-903

Dear Judge Druke:

Please be advised that I am the Vice-Chairman of the Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Community Tribal Government of the Fort Belknap Indian Reservation, Montana. I have been authorized by the tribal government to respond to the matters involving Indian children from the Fort Belknap Indian Reservation, Montana in custody matters which fall within the purview of the Indian Child Welfare Act.

In this instance, the tribal government wishes to intervene in this matter and have jurisdiction transferred to the Tribal Court of the Fort Belknap Indian Reservation, Montana. Please advise me if there are any additional documents which needs to be filed prior to the date of hearing on this matter.

Sincerely,

John Allen, Vice-Chairman
Fort Belknap Indian Community
Tribal Government

/ls

cc: Francis X. Lamebull, Attorney at Law, P.O. Box 38, Harlem, Montana 59526
Glorene Crantz, R.R. 1, Box 61, Harlem, Montana 59526
Jim Conway, Montana Legal Services Assn., P.O. Box 548, Havre, Montana 59501

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

Thomas Meeka
JUDGE, ~~COURT COMMISSIONER~~
of the Superior Court

NO. S-903

DATE May 8, 1981

On the matter of the
severance of

Joseph Andrew Crandy,
a person under the Age
of Eighteen years.

Ann Haralambie
PETITIONER'S ATTORNEY

Joyce Nelson - natural mother
RESPONDENT'S ATTORNEYS

MINUTE ENTRY

Re: Petition to Transfer to Tribal Court and Petition for Severance:

Deirdre Mungall reporting.

Minor child and natural mother not present.

Counsel argue the petition to Transfer to Tribal Court.

The Court takes under advisement the petition to Transfer to Tribal Court.

Re: Petition for Severance:

Marilyn Ingram is sworn, examined, cross-examined and questioned by the Court.

Dr. Ronald Fisher is sworn, examined and cross-examined.

Deirdre Short is sworn, examined and cross-examined.

11:45 P.M. The Court stands at recess until 1:30 P.M. this date

Sharon Attrell Deputy Clerk.

18-52

MINUTE ENTRY

Page No. 2 Date May 8, 1981 Case No. S-903

2:15 P.M.

Deirdre Mugall reporting.

Lyanne Downey-Lewis is sworn, examined and cross-examined.

Prospective adoptive father is sworn, examined and cross-examined.

Prospective adoptive mother is sworn, examined and cross-examined.

Petitioner rests.

Both sides rest.

The Court having taken under advisement the Petition to Transfer to Tribal Court.

It Is Ordered that the Petition to Transfer to Tribal Court is denied.

Counsel argue the Petition for Severance to the Court.

Based on the testimony,

The Court finds that the best interests of the minor child are with the petitioners.

The Court finds good cause to sever the parental rights of the natural mother, Patricia Sue Crantz.

It Is Ordered that the parental rights of the natural mother, Patricia Sue Crantz, are severed.

The Court finds as a matter of fact that the child was abandoned by the natural mother.

Sharon Cottrell Deputy Clerk.

MINUTE ENTRY

Page No. 3 Date May 8, 1981 Case No. 5-903

The Court directs Ms. Baralambie to prepare a written Order for the Court's signature.

Natural Mother's Exhibit A, being Mother's Birth Certificate, Child's Birth Certificate and Voluntary Relinquishment of Indian Child for Adoption, is identified and admitted.

cc: Ann Baralambie, Esq.
Southern Arizona Legal Aid (Joyce Dobey)
Court Adm.
Court Coordinator, Pima County Juvenile Court
Jim Conway, Montana Legal Services Assoc., 309 Masonic Temple Bldg., P.O. Box 548, Havre, Montana 59501
Tribal Council, Fort Belknap Indian Reservation, Fort Belknap Agency, Montana 59526
Hon. Thomas Maloney

Sharon Attrell Deputy Clerk.

FILED

1981 MAY 11 PM 1:01

JAMES [illegible]
CLERK [illegible]
BY [signature]
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

JUVENILE COURT

In the Matter of)
JOSEPH ANDREW CRANTZ,)
A Minor.)

No. S-903

CERTIFICATE OF SERVICE

Service of the foregoing Motion to Intervene by Fort Belknap Indian Community and to Transfer Proceedings to Tribal Court and Affidavit of Elmer M. Main, by means of first class mail this 5th day of May, 1981 is hereby certified to the following persons:

Honorable Gilbert Veliz, Judge
Superior Courts Building
111 West Congress
Tucson, Arizona 85701

Ann Haralambie, Esq.
Attorney at Law
2207 N. Campbell AVenue
Tucson, Arizona 85719

Jay W. McEwen, Esq.
Legal Aid
155 E. Alameda
Tucson, Arizona 85701

[signature]
Francis X. Lamebull, General Counsel
Fort Belknap Indian Community
Tribal Government

APPENDIX PAGES 7-13

FILED

1 MAR 11 PM 12 53

BY P Mata

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

JUVENILE COURT

No. S-903

In the Matter of)	MOTION TO INTERVENE BY
JOSEPH ANDREW CRANTZ,)	FORT BELKNAP INDIAN COMMUNITY
A Minor.)	AND TO TRANSFER PROCEEDINGS
	TO TRIBAL COURT

COMES NOW the Fort Belknap Indian Community, an Indian Tribe within the definition of 25 U.S.C. §1903(8), and moves the Court for an order allowing its intervention as an additional party petitioner herein, to assert its interest in this matter as set forth below:

1. Intervention as of Right Under Statute. The Fort Belknap Indian Community has an unconditional right to intervene in this action conferred by statute. 25 U.S.C. §1911(c) provides as follows:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

2. Mandatory Transfer of Proceedings to Tribal Court. The Fort Belknap Indian Community hereby petitions this Court for an order transferring these proceedings to the jurisdiction of the tribe, pursuant to 25 U.S.C. §1911(b), which provides as follows:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon

set forth in the Affidavit of the Superintendent of the Bureau of Indian Affairs, Fort Belknap Agency, attached hereto and incorporated herein by this reference.

3. Interest in the Proceedings. The action in this state court is an attempt to terminate the parent-child relationship between a member of the Fort Belknap Indian Community and her child. It further seeks to place permanent custody of this Indian child, a direct descendent of an enrolled member of the Fort Belknap Indian Community, with a non-community member; and further, attempts to place the child outside the state of Montana and outside the boundaries of the Fort Belknap Indian Reservation. There is no resource more vital to the continued existence and integrity of our Indian tribe than our children. It would be unfair to deprive us of a child of a registered member of our Indian community without notice or hearing. We believe that the only appropriate forum for determination of these questions is the Tribal Court of the Fort Belknap Indian Community, Fort Belknap Indian Reservation, Montana. For that reason, our Tribal Court has exclusive jurisdiction pursuant to 25 U.S.C. §1911(a).

4. Transfer of Proceedings. Joseph Andrew Crantz was placed for adoption in the state of Arizona; it now appears that, prior to the entry of a final decree of adoption, the Indian parent has withdrawn her consent to the adoption, that therefore the consent is invalid pursuant to 25 U.S.C. §1913(c). It is therefore appropriate that, pursuant to the spirit and letter of the Indian Child Welfare Act, these proceedings be transferred to the Tribal Court of the Fort Belknap Indian Community, Fort Belknap Indian Reservation, Montana, for investigation and determination of placement of the child that will not destroy her Indian family ties, culture, and heritage.

Joseph Iron Man

///

the petition of either parent or the Indian custodian or the Indian child's tribe...

3. Basis. This motion is based on the files and records herein, the Constitution and laws of the United States, and the annexed affidavit of Joseph Iron Man, Tribal Chairman of the Fort Belknap Indian Community, and authorized represenative of the Indian Child's tribe herein.

DATED this 6th day of May, 1981.

Fort Belknap Indian Community
Tribal Government

By: Joseph Iron Man
Joseph Iron Man, Chairman

District of Columbia ~~STATE OF MONTANA~~)
: ss.
~~COUNTY OF BLAINE~~)

JOSEPH IRON MAN, on oath, states as follows:

1. Statutory Right. The Fort Belknap Indian Community has an unconditional right to intervene in this action conferred by 25 U.S.C. § 1911(c) as set forth above in paragraph 1 of the motion.

2. Standing. The Fort Belknap Indian Community is the "Indian child's tribe as defined in 25 U.S.C. §1903(5), in that Joseph Andrew Crantz is the son of an enrolled member of the Assiniboine Tribe of the Fort Belknap Indian Reservation, Montana. Further, Joseph Andrew Crantz is eligible for enrollment in the Assiniboine Tribe of the Fort Belknap Indian Community. Patricia Sue Crantz, mother of Joseph Andrew Crantz, is a registered member of the Assiniboine Tribe, Registration No. 204-U04702, as

SUBSCRIBED AND SWORN to before me this 6th day of May, 1981.

Sheryl D Fitzpatrick
Notary Public for the ~~State of Montana~~ District of Columbia
Residing at 1201-16th St. N.W., Wash., DC
My commission expires: Aug. 31, 1983

FILED

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JAMES
CLERK
BY P Mata

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

JUVENILE COURT

In the Matter of)
JOSEPH ANDREW CRANTZ,)
A Minor.)

No. S-903

AFFIDAVIT

I, Elmer M. Main, resident of Fort Belknap Agency, Fort Belknap Indian Reservation, Montana, being duly sworn, depose and say:

That affiant is a resident of Fort Belknap Agency, Fort Belknap Indian Reservation, Montana, and executes this Affidavit knowing the contents thereof and voluntarily executes this Affidavit as follows:

1. That I am the Superintendent, Bureau of Indian Affairs, Fort Belknap Agency, Fort Belknap Indian Reservation, Montana.

2. That I make this Affidavit voluntarily and on behalf of Patricia Sue Crantz.

3. That as Superintendent of the Bureau of Indian Affairs, Fort Belknap Agency, Fort Belknap Indian Reservation, Montana, I have knowledge that Patricia Sue Crantz is an enrolled member, ID #204-U04702, of the Assiniboine Tribe, a federally recognized Indian Tribe of the Fort Belknap Indian Community, Fort Belknap Indian Reservation, Montana.

4. Pursuant to records on file at the Bureau of Indian Affairs, Fort Belknap Agency, Fort Belknap Indian Reservation, Montana, Patricia Sue Crantz possesses the following Indian blood:

1/4 Gros Ventre, 7/16 Assiniboine, 1/8 LS Chippewa, 1/16 Blackfeet=7/8 total

///

PAGE 1 - AFFIDAVIT OF ELMER M. MAIN

DATED this 4th day of May, 1981.

Elmer M. Main

Elmer M. Main

VERIFICATION

FORT BELKNAP INDIAN RESERVATION, MONTANA)
: ss.
COUNTY OF BLAINE)

Elmer M. Main, being first duly sworn, deposes and says: That he executed the foregoing Affidavit; that he has read the foregoing, knows the contents thereof, and that the facts and matters therein contained are true, accurate, and complete to the best of his knowledge and belief.

Elmer M. Main

Elmer M. Main

SUBSCRIBED AND SWORN to before me this 4th day of May, 1981.

Candace D. Gray
Notary Public for the State of Montana
Residing at Harlem, MT
My commission expires: 6-8-81

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Tucson, Arizona 85719
Telephone No: 327-6287
Pima County Computer No. 23364
Attorney for Petitioner/Appellee

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

In the Matter of the Appeal in Pima County Juvenile Action No. S-903

No. S-903

RESPONSE TO NOTICE OF APPEAL

Appellee, CATHOLIC SOCIAL SERVICE, by and through counsel undersigned, answers each of the grounds for appeal raised by the appellant in the Notice of Appeal filed on May 26, 1981 in the above-captioned case as follows:

1. The Court had good cause to deny appellant's motion to transfer the matter to tribal court.

2. The Court had jurisdiction to hear the matter based on the domicile of the child, Petitioner, and the adoptive parents.

3. The Court's decision was made within the provisions of the Indian Child Welfare Act of 1978 and was fully supportable by the standards of that Act.

Dated June 10, 1981.

Ann M. Haralambie
ANN M. HARALAMBIE
2450 East Speedway Blvd
Tucson, Arizona 85719
Attorney for Appellee

. . . .

. . . .

. . . .

APPENDIX PAGES 14-26

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Copy of the foregoing
delivered this day to:

JOYCE EDLINE HOLSEY
155 East Alameda
Tucson, Arizona 85701
Attorney for Appellant

MEMORDANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

The minor child, Joseph Andrew Crantz, was born on February 27, 1980, in Henderson, Nevada. His mother, an Assinboine Gros Ventre Indian, left her reservation in Montana to stay with her aunt in Nevada during her pregnancy. During that time she received counseling from the Nevada Catholic Welfare Bureau, to whom she subsequently relinquished the child for adoptive placement. Although she was given the opportunity to raise the child with her aunt's help and was presented with other options concerning the child, she remained adamant about her decision to relinquish him. She requested confidentiality from her tribe and asked that the Nevada Catholic Welfare Bureau place the child through state court for an adoption by an Indian family from a different tribe.

On March 18, 1981, the mother executed her relinquishment in open court. Pursuant to that relinquishment the child was placed with a Papago Indian family in Tucson through Catholic Social Service, Petitioner herein. On September 29, 1981, the mother executed a revocation of relinquishment and requested return of the child. Petitioner declined to return the child, and instead, filed the Petition for Termination of Parental Rights herein on the grounds of abandonment.

The testimony at trial was uncontroverted that the mother has had no contact with the child and had never inquired about him even up to the date of the trial. The

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uncontroverted expert testimony also established the likelihood of serious damage to the child should he be removed from his pre-adoptive family, the only family he has ever known.

I

THE COURT HAD GOOD CAUSE TO DENY THE MOTHER'S MOTIONS TO DISMISS AND TO TRANSFER TO TRIBAL COURT.

A. 25 U.S.C §1911(6) provides a limitation on extra-territorial jurisdiction when the state court determines that there is good cause to retain jurisdiction. That provision states, in relevant part:

> In any state court proceeding for the . . . termination of parental rights to an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe. . . [Emphasis added]

The Supreme Court of Montana has analyzed the situation of jurisdiction under the Indian Child Welfare Act as follows:

> A possible change in the relationship between parent and child is so important that the change should be made only by the jurisdiction which has significant ties and interests in the child and which will be best able to determine what the best interests of the child are with regard to custody, H. Goodrich E. Scoles Conflicts of Laws, 271 (4th ed. 1964). Writers in this field generally agree that any choice of law rules with regard to jurisdiction must give way to the child's welfare as the determinative touchstone for jurisdiction even though it is also the basis for deciding custody disputes on the merits. R. Leflar, American Confilicts of Law 492 (3rd ed. 1977; Restatement (Second) of Conflict of Laws §79, Comment a(1971); See Sampsell v. Superior Ct. (1948); 32 Cal. 2d 763, 197 P.2d 739,748-750. Indeed, courts do not unanimously ascribe to any choice of law rule precisely for the reason that each court

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> tends to apply its own view of the universal rule that the prime jurisdictional consideration is the best interests of the child. H. Goodrich & Scoles, Conflict of Laws 272 (4th ed. 1964). (Emphasis added.) In the Matter of the Application of Bertelson, 617 P.2d 121 at 126 to 127 (Montana 1980). [Emphasis added]

If the state court finds good cause and retains jurisdiction, the tribe's rights are protected by the provision allowing that the tribe may intervene at any point in the proceeding. 25 U.S.C.A. §1911(c). In the case at bar the tribe did intervene, but while it filed a motion and memorandum, it failed to provide the Court with evidence of any type.

The only evidence available in Montana concerns the mother's background before mid-pregnancy and after the child's birth, her current situation, and tribal values. That evidence could have been made available in Arizona by the presence of the mother and a tribal representative. Neither chose to attend the trial, file depositions, or otherwise participate in the trial, notwithstanding the fact that they had ample notice of the trial date.

The state statutes clearly provide that once a valid relinquishment is executed, the child's best interests are of overriding concern, especially if the child has already been placed in an adoptive home.

If the court had granted the motion to transfer jurisdiction, the temporary custody orders under the adoption and severance actions would have terminated and the de facto legal cutody of the child would have been posited in the mother or the tribe. The potential damage to the child that was proven at trial would have been accomplished prior to any hearing taking place in Montana because the child would have been removed from his adoptive family upon termination of the temporary custody orders.

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B. The mother argues that she properly revoked her relinquishment according to the terms of the Act. Petitioners have never maintained that she did not. However, the petition herein was based on the involuntary termination. The provisions concerning voluntary relinquishment do not preclude the court's finding of cause for termination. The expert testimony offered at trial showed clearly that while the overwhelming majority of mothers express some interest in the child after relinquishment, this mother expressed none.

If the minor child herein were not an Indian, the mother would find it very difficult to revoke her consent for his adoption. Arizona law provides that even a minor parent may execute a valid consent. A.R.S. §8-106(0). Nevada, the state where the consent was executed, has a similar provision. N.R.S. §127-080 (z). In Nevada, a valid relinquishment is irrevokable. N.R.S. §127. 080(1). Under Arizona law a relinquishment cannot be revoked after the child's placement in a preadoptive home absent legal cause shown and a showing that return to the birth parents would be in the child's best interest. In re Adoption of Holman, 80 Ariz. 201, 295 P.2d 373(1956). Similarly, had the mother relinquished in her own state of Montana, withdrawal of consent would not be permitted absent a showing that such a revocation would further the best interests of the child. M.C.A. §40-8-112

The state statutes clearly provide that once a valid relinquishment is executed, the child's best interests are of overriding concern, especially if the child has already been placed in an adoptive home. The mother herein chose to leave her reservation upon becoming pregnant. She went to Nevada, where an aunt of hers lived, and where she received extensive counseling from the Nevada Catholic Welfare Bureau. It was only after carefully exploring all of the options to adoption

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that she executed her relinquishment. Based on that relinquishment the child's position was materially changed to his detriment--he was placed with another family as their son.

The Petitioner does not contend that the parties were unaware of the mother's right under the Act to revoke her consent prior to entry of the adoption decree, however unlikely exercise of such a right may have appeared at the time. Allowing such a result as a matter of law, however, would place the child, as an Indian, at a disadvantage not suffered by non-Indian children. His security and stability would be shattered, perhaps at the cost of permanent difficulties in establishing trust relationships. If this is the result compelled by the Act, then such provision violates the child's right to equal protection by failing to allow his best interests to be considered merely because of his race.

While the equal protection clause of the Fourteenth Amendment to the Untied States Constitution does not apply to the federal governmnet, it is clear that racially discriminatory federal actions which would violate that clause if done by a state violate the Fifth Amendment's due process clause. See Bolling v. Sharp, 347 U.S. 497(1954). When tribal Indians "are put at a serious racially based disadvantage" by a federal statute, their "rights to due process and equal protection under the Fifth Amendment require that they not be treated worse than similarly situated non-Indians." United States v. Antelope , 523 F.2d 400, 403-406 (9th Cir. 1975), reversed on other grounds, 97 S.Ct. 1395(1977). Any federal statute which is directed at Indians as a racially defined class is subject to strict scrutiny to prevent invidious discrimination. Id.

Congress may extend remedial benefits or services to Indians as a racial group without violating the Fifth Amendment,

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See, e.g., Maynor v. Morton, 510 F.2d 1254, 1256 (D.C. Cir. 1975). The Indian Child Welfare Act holds itself out as such a remedial attempt. 23 U.S.C.A. §1902. The Act attempts to benefit Indian families by providing that removal of a child from his Indian family will be ordered only after an opportunity for an evaluation which takes into account the tribe's cultural values. This was required because of the often inappropriate removals of children be dominant-culture social workers and courts. What was acceptable parenting within the context of the tribal culture was held to be, in effect, negligence or abuse per se. Protection against such cultural bias was the remedial benefit sought to be conferred upon Indian families, and it is in this context that the case at bar must be analyzed.

The child herein was not removed from his tribe or his mother. Rather, his mother chose to leave the reservation and to relinquish her parental rights to enable him to be adopted. An Indian family was selected, and the adoption process was initiated. The entire sequence was free of any cultural considerations, other than the decision to enhance the child's Indian culture by placement with an Indian family, albeit one from a different tribe. The evil sought to be remedied by the Act does not pertain to this case.

The child, on the other hand, is adversely affected by the Act, if it is construed to require this Court's transfer of the matter to the tribal court or acceptance of the mother's revocation of consent merely because the Act so permits. In this instance the child is denied the stability which the state adoption laws of all three states involved attempt to provide solely on the basis that his mother is an Indian. Herein the rules enunciated in the United States v. Antelope and Maynor v. Morton, supra, conflict. A law conferring a

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remedial benefit on the Indian mother places the Indian child at a serious disadvantage. The whole scheme of state severance and dependency laws, while recognizing certain parental rights, rules in favor of the child's best interest where there is a conflict between parents and children.

The Petitioner does not contend that the entire Act is unconstitutional. What it does contend is that it is a denial of an Indian child's right to equal protection for his mother to be able to revoke her consent for adoption after he has been placed in an adoptive home merely on the basis that she has changed her mind. This is particularly true when the mother has voluntarily left the reservation and relinquished to an adoption agency after extensive counseling. Not only does such a provision disrupt the adoptive home, but it totally disregards the affect on the child's relationships and security. It does this in a situation where the tribal culture is irrelevant, since there was no state removal of the child based on perceived inadequacies of the Indian mother or her tribal home.

25 U.S.C.A. §1913(c), if applied to the case at bar, denies the child' right to equal protection under the law in violation of the Fifth Amendment to the Constitution.

C. The mother further argues that the child was domiciled at the Fort Belknap Reservation. Although she states that the court made no finding as to domicile the record clearly shows otherwise. The trial court made an explicit finding that once the mother executed her relinquishment, the child's domicile no longer derived from her, and that the child's current domicile is Arizona, the state of his residence and the domicile of his adoptive parents.

The mother cites two cases for the proposition that a child's residence is that of the parents. The facts in those

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cases are easily distinguishable. In Re Webb's Adoption, 65 Ariz. 176, 179 P.2d 222(1947), held that where a divorce decree, which gave custody to the father, is later modified by a court to give custody to the mother, who resides in another county, the child's domicile is the same as the mother's domicile. Matter of Guardianship of D.L.L. & C.L.L.. 291 NW.2d 278 (S.D. 1980) held that where the Indian parents and children all resided on the reservation, and the tribal court granted temporary cutody of the children to a group foster home not on the reservation, the children remained domiciled on the reservation. In the case at bar the child was not born on the reservation and never visited or lived on the reservation. In addition, the mother relinquished her parental rights, unlike the parents involved in the other two cases. She cites no authority that domicile returns to the mother de jure when the child is in a pre-adoptive placement where he has spent virtually all of his life. The trial court was correct in finding that the child's domicile was in Pima County, Arizona.

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II

THE COURT HAD JURISDICTION TO HEAR THE MATTER BASED ON THE DOMICILE OF THE CHILD, PETITIONER, AND THE ADOPTIVE PARENTS

The mother cites a student note at 21 ARIZ.L.REV. at 1143(1979) for the proposition that "[a]ccessibility to proof that the parents are unfit would seem to be the basis for the state courts to retain jurisdiction." The actual statement in the article is:

> If the state court determines that due to the unavailability of proof, the tribal court would not be able to make an informed judgment concerning parental fitness, the state court could legitimately refuse to transfer the matter because "good cause" would be present. [168] Accessibility to proof would seem to be the principal factor on which state courts

could rely to retain child custody jurisdiction.

. . .

168. Cf. Del Rio v. Ballenger Corp., 391 F. Supp. 1002, 1003-05 (D.S.C. 1975) (the difficulty in bringing witnesses and preparing the case for trial in South Carolina is sufficient basis for invoking forum non conveniens doctrine); Harrison v. Capivary, Inc., 334 F. 1141, 1142(E.D.Mo. 1971) (substantially all the witnesses and material documents were located in Panama, thus applying the forum non conveniens doctrine was appropriate); Spencer v. Alcoa S.S. Co., 22F. Supp. 343, 345-46 (E.D.N.Y. 1963)(since all of the witnesses resided in a different jurisdiction the doctrine of forum non conveniens was applied). [Id.]

Abandonment is a unique ground for the involuntary termination of parental rights because it does not require the showing of any intrinsic unfitness. Rather, it focuses on the existence and quality of the parent's contact with the child. Therefore, the proof is found where the child has been, in this case, in Nevada and Arizona. The Nevada evidence was produced at trial through the testimony of the director of adoptive services for the Nevada Catholic Welfare Bureau, who counseled the mother and was present during the relinquishment and follow-up. She testified that had the mother made any inquiries about the child, she would be the one notified.

The testimony concerning the child's situation and the danger he would be placed in should he be removed from the only family he had ever known could come only from the experts in Arizona who had evaluated and monitored the child and from the adoptive parents. It would have been difficult to bring those witnesses to and prepare for trial in the tribal court in Montana. It is clear that "accessibility to proof" was overwhelmingly in Arizona.

Further good cause is provided by the risk to the chi[illegible]

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be granted if the child is not already in the parent's custody. For example, it would be ludicrous to assume that the parental rights could not be terminated in the following hypothetical case: An Indian gives birth to a child while she is in a hospital for the criminally insane. The unmarried father immediately takes custody of the child. The mother then leaves the hospital on a pass and brutally maims the child. The doctors say she is uncontrollably violent and is not likely to improve. While these facts are obiously very aggravated, the mother's interpretation of the statute would preclude termination of that mother's rights on the sole ground that danger by "continued custody" could not be shown because the mother never had custody to begin with. The result would be absurd.

While petitioners have not alleged intrinsic unfitness of the mother, her unfitness to have custody of this child by reason of her abandonment and the minor's needs to remain in his adoptiv · home have indeed be shown and proven beyond a reasonable doubt at trial. It is no defense that the mother never had custody and therefore no proof of what would happen during "continued custody" would be possible.

CONCLUSION

This case does not involve a contract for the transfer of a sack of flour. It involves a human life, a child who, through no fault of his own, was conceived, born, and placed for adoption. His mother received counseling concerning her relinquishment decision and was offered the support of her relatives if she wanted to raise the child herself. She remained adamant about wanting the child placed through the state court in a home of Indians not of her tribe.

Based on those decisions, the child was placed in an adoptive home. He is too young to understand what adoption is.

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should he have been separated from his adoptive parents and returned to Montana for trial before the tribal court. The expert testimony at trial established this risk regardless of the eventual outcome of the case by the tribal court. The child came to be in the Arizona placement by virtue of the language in the mother's relinquishment that "all legal matters pertaining to this adoption remain in the jurisdiction of the State Court and not be transferred to Tribal Court" and that "her minor child be placed in an Indian Home of a Tribe other than her own." Having allowed the child to form an extremely close attachment to his adoptive parents on the basis of her own request, the mother cannot argue that the child's interests are irrelevant and that the trial court must transfer the matter to tribal court without regard to the welfare of the child.

The mother cites In the Matter of the Application of Bertelson, 617 P.2d 121 (Mont. 1980) in stating that Arizona's contacts and interests in the parties is more substantial than those of the tribe. However, as has been previously quoted above, that Court determines ultimately that

> "any choice of law rules with regard to jurisdiction must give way to the child's welfare as the determinative touchstone for jurisdiction even though it is also the basis for deciding custody disputes on the merits. Id. at 127.

III

THE COURT'S DECISION WAS PROPER WITHIN THE STANDARDS OF THE INDIAN CHILD WELFARE ACT OF 1978

The mother is correct that the language of the Indian Child Welfare Act of 1978 is phrased in terms of "continued custody of the child by the parent" 25 U.S.C.§1912(f). However, it is submitted that such language does not provide the exclusive circumstances under which termination may

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The uncontroverted testimony established that all he understands is that he has parents and a family in Tucson, Arizona.

Unlike other mothers, his mother showed no interest in him or concern for him. Even after the revocation of her relinquishment, she made no inquiries about him. In the meantime, he established a close bond with his adoptive family. Under the facts of this case the trial court did not act contrary to law or abuse its discretion in terminating the mother's parental rights.

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(REVISED 1979)

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CHILDREN'S CODE

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APPENDIX PAGES 27-35

SECTION 1. THE PURPOSE OF THE TITLE XII

1.1 The young people of the Gros Ventre and Assiniboine tribes are the Tribes' most important resource and their welfare is of paramount importance to the Fort Belknap tribes.

1.2 It is important that the young people of the Fort Belknap tribes receive, preferably in their own homes, the care and guidance needed to prepare them to take their places as adult members of the Fort Belknap tribes.

1.3 This Court shall protect the child's interest by choosing a course of action which least restricts the child's freedom and is consistent with the safety and interests of the Fort Belknap tribes.

1.4 The Fort Belknap tribes need a recognized children's court system to insure and safeguard the rights of children pursuant to applicable tribal and federal law; to improve any conditions or home environment, which may be contributing to a youth's delinquency; and at the same time, to protect the peace and security of the community; and to preserve and strengthen the youth's cultural and Tribal identity; and to preserve and strengthen family ties.

SECTION 7. TERMINATION

7.1 Parental rights to a youth may be terminated by the Children's Court according to the procedures in this Section.

7.2 Petition. Proceedings to terminate parent rights shall be instituted by a petition filed by the presenting officer on behalf of the Tribe pursuant to Section 6.16F or by the parents or guardian of the youth. The petition shall state:

A. The name, birthdate, and residence of the youth;

B. The names and residences of the youth's parent, guardian or custodian;

C. If the youth is in detention or shelter care, the place of detention or shelter care and the time he was taken into custody.

7.3 Upon receipt of the petition, the Children's Court shall set a date for the termination hearing which shall be not more than ten (10) days after the Children's Court receives the petition from the presenting officer. The hearing may be continued:

A. Upon motion of the youth's parent, guardian or custodian; or

B. Upon motion of the presenting officer by reason of the unavailability of material evidence or witnesses and the Children's Court finds the presenting officer has exercised due diligence to obtain the material or evidence and reasonable grounds exist to believe that the material or evidence will become available.

7.4 Pre-termination report.

A. Within two (2) days of receiving the petition, the Children's Court judge shall order the preparation of a pre-termination report by the Children's Court counselor.

B. The Children's Court counselor shall consult with the youth's parents and all social services, health, education and other personnel who have had prior professional contacts with the youth and his parents, guardian or custodian to determine whether termination of parental rights is consistent with the best interests of the youth. The counselor may also review any of the youth's previous Children's Court records.

C. The Children's Court counselor shall prepare a written report containing the professional opinions of all personnel with whom he has consulted. The report shall be presented to the Children's Court at least two (2) days before the termination hearing.

7.5 Summons.

A. At least five (5) days prior to the termination hearing, the Children's Court shall issue summons to:

1. The youth; and
2. The youth's parent, guardian or custodian; and
3. Any person the Children's Court believes necessary for the proper adjudication of the hearing; and
4. Any person the youth's parent, guardian or custodian believes necessary for the proper adjudication of the hearing.

B. The summons shall contain the name of the Court, the title of

the proceedings, and the date, time and place of the hearing.

C. A copy of the petition shall be attached to the summons.

D. The summons shall be delivered personally by a tribal law enforcement officer or appointee of the Children's Court. If the summons cannot be delivered personally, the Court may deliver the summons by registered mail. If the summons cannot be delivered personally or by registered mail, the summons may be by publication.

E. If a person who has been issued a summons fails to appear at the hearing, the person shall be held in contempt of Court.

7.6 Termination hearing. The Children's Court shall conduct the termination hearing for the sole purpose of determining whether parental rights shall be terminated. The hearing shall be private and closed.

A. Right of Parties.

1. Right to counsel.

a. The Children's Court shall inform the youth and his parents, guardian or custodian of their right to retain counsel by telling them, "According to the Indian Civil Rights Act, you have a right to have a lawyer or other person represent you at this hearing. However, you or your family must pay any fees for such representation."

b. If the parties appear at the hearing without counsel, the Children's Court judge shall continue the proceedings if they need additional time to seek counsel.

c. If the parties are unable to pay for counsel, the Children's Court judge shall inform them of any available services that provide representation.

2. The youth's parents need not be a witness against, nor otherwise incriminate, themselves.

3. The Children's Court shall give the youth, his counsel or person he has selected to represent him, and the youth's parent, guardian or custodian and his counsel or person he has selected to represent him, the opportunity to introduce evidence, to be heard on their own behalf and to examine witnesses.

B. The Children's Court shall hear testimony concerning:

1. The circumstances that give rise to the petition; and

2. The need for termination of parental rights.

C. The Children's Court may terminate the parental rights of the parent(s) to his child if it finds clear and convincing evidence that:

1. The parent has abandoned his child;

2. The youth has suffered physical injuries willfully and repeatedly inflicted by his parent(s) upon him which causes or creates a substantial risk of death, disfigurement, or impairment of bodily functions.

3. The parent(s) have subjected the youth to willful and repeated acts of sexual abuse; or

4. The voluntary written consent of both parents has been acknowledged before the Court.

7.7 Dispositional alternatives.

A. If parental rights to a youth are terminated, the Children's Court shall:

1. Place the youth in a foster care or shelter care facility which has been approved by the Tribes; and

2. Proceed to the adoption section of the Tribal Code.

B. If parental rights to a youth are not terminated, the Children's Court shall make a disposition according to Section 6.16 of this Title.

7.8 The termination order constitutes a final order for purposes of appeal.

7.9 No adjudication of termination of parental rights shall affect the youth's enrollment status as a member of any Tribe or the youth's degree of blood quantum of any Tribe.

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November 12, 1980

Nov 18 1980
JAN
CLERK
BY

S-903

Office of the Clerk
Superior Court of the State of Arizona
Pima County
Tucson, Arizona 85719

Re: Case No. S-903
In the Matter of Joseph Andrew Crantz, a minor

Dear Sir:

Patricia Sue Crantz, mother of Joseph Andrew Crantz, a minor, on March 18, 1980, executed a Voluntary Relinquishment of an Indian child for adoption before the Honorable J. Charles Thompson, District Judge of the Eighth Judicial District Court, in and for the County of Clark, State of Nevada. On September 29, 1980, she executed a withdrawal of the Voluntary Relinquishment. In accordance with the Indian Child Welfare Act of 1978, Public Law 95-608, this was filed on October 2, 1980, in the Eighth Judicial District Court here in Nevada. However, since the minor child is now placed in Arizona and termination proceedings have been instituted in your Court, we enclose a certified copy of the withdrawal. Please see that this is placed in the above entitled file and called to the attention of the appropriate Judge.

Very truly yours,

John L. Thorndal
Attorney for Nevada Catholic Welfare

JLT/ad

Enc.

cc: Ann M. Haralambie

James Conway, Esq.
North Central Montana Circuit
Rider Attorney Office
P. O. Box 548
Havre, Montana 59501

81-1318

RECEIVED
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SUPREME COURT, U.S.

IN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

CATHOLIC SOCIAL SERVICES OF TUCSON, Petitioner,

v.

P.C., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

MOTION TO PROCEED IN FORMA PAURERIS

Respondent, Patricia Sue Crantz, hereby moves this Court for an Order permitting her to proceed in forma pauperis pursuant to 28 U.S.C. §1915, respectfully representing that:

1. She is a respondent in the above-entitled action.

2. She believes that she is entitled to the relief sought herein.

3. As the attached affidavit demonstrates, she is unable to pay the fees and costs in this action without incurring great financial hardship.

Dated this 9th day of February, 1982.

Joyce Edline Holsey
JOYCE EDLINE HOLSEY

Copy of the foregoing mailed
this 9th day of February, 1982,
to:

Ann M. Haralambie
2450 E. Speedway Blvd.
Tucson, Arizona 85719
Counsel for Petitioner

JOYCE EDLINE HOLSEY
SOUTHERN ARIZONA LEGAL AID, INC.
155 East Alameda Street
Tucson, Arizona 85701
Telephone: (602) 623-9461
Attorney for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-1813

CATHOLIC SOCIAL SERVICES OF TUCSON, Petitioner,

v.

P.C., Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN ARIZONA COURT OF APPEALS, DIVISION TWO

STATE OF ARIZONA)
)ss.
COUNTY OF PIMA)

PATRICIA SUE CRANTZ, being first duly sworn, upon her oath deposes and says:

1. That she is the respondent herein;

2. That she believes that she is entitled to the relief sought herein;

3. That she is a student in high school.

4. That she has no source of income.

5. That she has no bank accounts, stocks, bonds, real property, automobiles or any other possessions of value.

6. That her only source of income are room and board from the parents, Glenn and Leona Messerly, Robert Glenn Messerly father of Joseph Andrew Crantz and are residing in the Fort Belknap Indian Reservation.

7. Because of her poverty she is unable to pay the fees and costs in this action or give security therefor and to provide herself with the necessities of life.

Patricia Sue Crantz

Patricia Sue Crantz

SUBSCRIBED AND SWORN to before me this 22nd day of January, 1982..

Maria C. Shields

Notary Public

My Commission Expires:
September 17, 1982

SOUTHERN ARIZONA LEGAL AID, INC.

IN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1813

CATHOLIC SOCIAL SERVICES OF TUCSON, Petitioner,

v.

P.C., Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

ORDER GRANTING MOTION TO PROCEED IN FORMA PAUPERIS

Respondent Patricia Sue Crantz having filed a Motion to Proceed in Forma Pauperis pursuant to 28 U.S.C. §1915, and good cause appearing, it is hereby ordered, adjudged and decreed that the same should be and hereby is granted.

Dated this ___ day of February, 1982.

JUSTICE OF THE UNITED STATES SUPREME COURT